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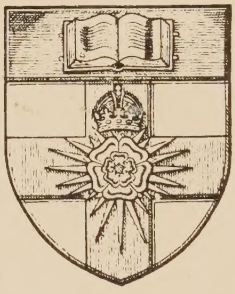

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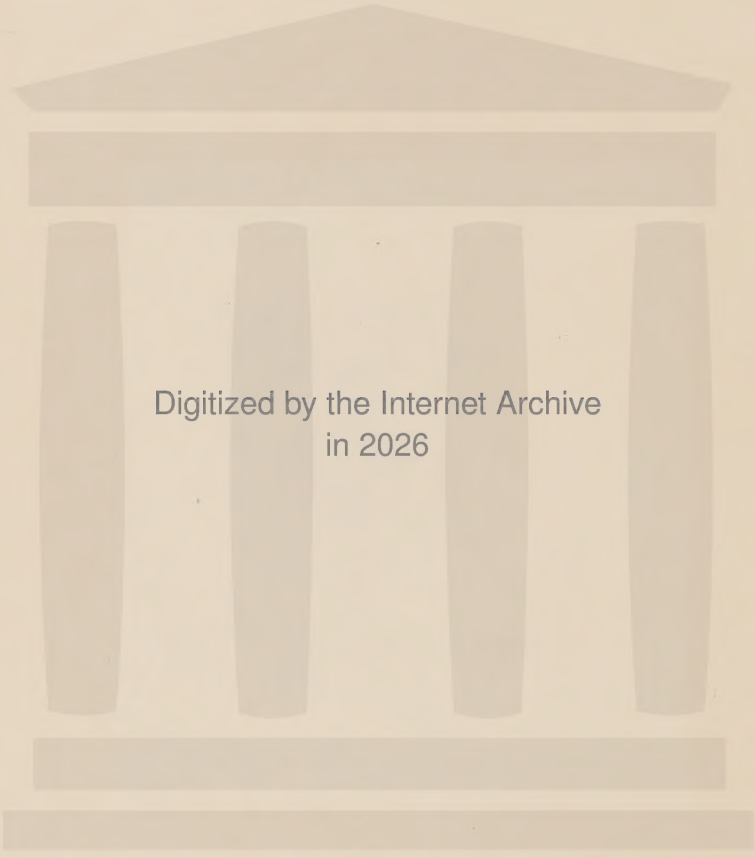
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AND BY THE

RAILWAY AND CANAL COMMISSION.

SALBSTEIN *v.* ISAACS & SON AND ANOTHER.

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Nov. 9, 10.

County Court—Practice—Interpleader—Proceeding at Instance of Sheriff remitted from High Court—No Claim for Damages in Proceeding in the County Court—Subsequent Action by successful Claimant for Damages—County Court Rules, Order XXVII., r. 8; Order XXXIII., r. 11.

Order XXXIII., r. 11, of the County Court Rules, which provides that no claim for damages shall be allowed in any interpleader proceeding commenced at the instance of the sheriff and remitted from the High Court, is not ultra vires. Therefore the successful claimant to goods in such a proceeding is not precluded from bringing a subsequent action against the execution creditor and his solicitor for damages for trespass to his goods.

APPEAL from the Croydon County Court.

The plaintiff brought this action in the county court claiming damages from the defendants for trespass to his goods. The

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defendants Isaacs & Son had obtained judgment in the High Court for a sum of money against Salbstein Brothers and issued a writ of execution. By their direction and that of their solicitor, Law, the other defendant, the sheriff levied execution upon the premises of the plaintiff, who was not the judgment debtor. The plaintiff claimed the goods seized, and on the application of the sheriff an order was made that an issue should be tried between the claimant and the execution creditors and that the interpleader proceeding should be remitted to the Croydon County Court. In the county court the plaintiff did not make any claim for damages against the present defendants, and the issue as to the ownership of the goods was decided in his favour. The plaintiff thereupon brought this action for damages, and the defendants set up the defence that there was no jurisdiction to award damages inasmuch as any claim for damages ought to have been made in the interpleader proceeding. (1) The county court judge gave judgment in favour of the plaintiff for 5*l.* 5*s.* damages.

The defendant Law appealed.

F. Newbolt, K.C., and *M. J. Doherty*, for the appellant. The interpleader proceeding when remitted to the county court became for all purposes a proceeding in that court as if it had been commenced there: *Harris* v. *Judge* (2); *Buckley* v. *National Electric Theatres* (3); s. 17 of the Judicature Act, 1884; s. 69 of the County Courts Act, 1888. That being so, the provision of the County Court Rules, Order XXVII., r. 8, that the claimant, if he claims damages, must state his claim and the grounds thereof in the particulars of his claim to the goods, becomes applicable. If, therefore, a claimant of goods taken in execution also claims damages in respect of the seizure of the goods, his claim must be

(1) County Court Rules, Order XXVII,. r. 8 (1.): "Where the claimant to goods taken in execution claims damages from the execution creditor or from the high bailiff for or in respect of the seizure of the goods, he shall in the particulars of his claim to the goods state the amount he claims for damages, and the grounds upon which he claims damages."

Order XXXIII., r. 11: "No claim for damages shall be allowed in any such proceeding"—that is, in an interpleader proceeding at the instance of the sheriff remitted from the High Court.

(2) [1892] 2 Q. B. 565.

(3) [1913] 2 K. B. 277.

made and tried in the interpleader proceeding, and if he does not then claim damages he cannot make any subsequent claim; s. 157 of the County Courts Act, 1888, and r. 11 of Order XXXIII., which says that no claim for damages shall be allowed in an interpleader proceeding remitted from the High Court, is ultra vires. Rules made under s. 164 of the County Courts Act cannot treat actions and proceedings remitted from the High Court, which then become the same as if originally commenced in the county court, in a different manner from original county court matters; and a rule such as this is contrary to the provisions of s. 157 of the County Courts Act. Therefore, the ordinary rule provided by r. 8 of Order XXVII. applies, and the claim for damages not having been in the interpleader proceeding cannot be made at all.

J. Flowers, for the respondent. Order XXVII., r. 8, does not apply to an interpleader proceeding instituted by the sheriff and remitted from the High Court. It applies in terms only to a claim for damages against the execution creditor or high bailiff, and that shows that it can apply only to an interpleader proceeding originally commenced in the county court where execution has been levied by the high bailiff. Then r. 11 of Order XXXIII. applies to a remitted interpleader proceeding, and that rule appears to have been founded upon the decision of the Divisional Court in *Oliver* v. *Lewis* (1), that a claim for damages cannot be made in a remitted interpleader proceeding. The reason for the rule seems to be that interpleader is an equitable matter and that, being equitable, a claim for damages at common law cannot be joined. There is ample power under s. 164 of the County Courts Act to make this rule, and it does not in any way conflict with s. 157, which in terms applies only to execution levied by the high bailiff. There is no ground for saying that this rule is ultra vires.

Newbolt, K.C., replied.

AVORY J. This was an action brought in the county court by J. Salbstein against Isaacs & Son, and their solicitor, Law, for damages for trespass to his goods. The trespass complained of was an execution put in by the defendants Isaacs & Son, and directed by the other defendant, upon the premises of the plaintiff.

(1) [1889] W. N. 224.

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Prior to this action an interpleader issue was tried in the Brighton County Court, in which it was decided that the goods seized were the property of the present plaintiff and not of the execution debtor. At the trial of the present action it was proved that the goods which had been seized were the property of the plaintiff, and, consequently that there had been a trespass to his goods; and the only question then left for decision by the county court judge was as to damages, and he awarded 5*l.* 5*s.*

It is now contended for the appellant that the judgment ought to be set aside upon the ground that the judge had no jurisdiction to entertain the claim for damages, because any claim for damages ought to have been put forward and adjudicated upon at the trial of the interpleader issue, and further that no actual damages were proved, and the damages awarded ought to have been merely nominal. Upon the latter point it is sufficient to say that it is impossible for this Court to interfere with the decision of the county court judge. It is not true to say that in an action for trespass to goods the damages must be merely nominal unless actual damage is proved. The main point is that the judge had no jurisdiction because the claim for damages could only be put forward in the interpleader proceeding. The appellant relies in support of his contention upon the provisions of Order XXVII., r. 8, of the County Court Rules, which provides [the learned judge read the rule]. To this extent I agree with that contention, that the rule contemplates that any claim for damages in interpleader proceedings commenced in the county court, to which the high bailiff is a party, should be dealt with at the same time as the claim to the goods. It may be that in such an interpleader proceeding commenced in the county court this rule would support the appellant's contention that any claim for damages must be put forward then or not at all. Our attention, however, has been called to Order XXXIII., r. 11, which applies to an interpleader proceeding remitted from the High Court, which is the present case. The prior rules of Order XXVII. deal with interpleader matters commenced in the county court, and r. 11 of Order XXXIII. says in the plainest language with regard to remitted proceedings that "no claim for damages shall be allowed in any such proceeding."

It is obvious that the only way out of this difficulty for the

appellant is to say that r. 11 of Order XXXIII. is ultra vires. I can see no ground for saying so. This rule clearly relates to the practice or form of proceedings in the Courts, within s. 164 of the County Courts Act, 1888, under which these rules were made; and it appears to have been made in order to carry out the decision of the Divisional Court in *Oliver* v. *Lewis* (1), where it was held that in the case of an interpleader proceeding remitted to the county court there was no jurisdiction in the county court to entertain a claim for damages. That decision appears to have been incorporated in this rule. That being so, I cannot see any ground for saying that r. 11 of Order XXXIII. is ultra vires. The appellant, therefore, fails upon that point.

LUSH J. The point raised is one of some novelty. Order XXVII., r. 8, does seem to make it obligatory upon a claimant in interpleader, if he seeks to claim damages against the high bailiff or execution creditor, to make that claim at the hearing of the interpleader issue. The rule seems to say so imperatively. Now it is remarkable that this rule apparently does not contemplate that the person directing execution to be levied upon the goods of the claimant may not be the execution creditor. In the present case it was the solicitor of the execution creditor. It is strange that the framers of the rule never provided for that case. It would seem to follow that, if both the execution creditor and his solicitor gave directions to levy on the goods of the claimant and might consequently both be liable in damages, the singular result of r. 8 would be that a claim for damages against the execution creditor ought to be made in the interpleader proceeding, but not the claim against the solicitor. But for the provisions of Order XXXIII., r. 11, there might have been a serious difficulty in the present case, because this action is brought against both, and under Order XXVII. the claim for damages could not have been made against the solicitor in the interpleader, but only against the client. Therefore I think that if the question had remained under Order XXVII., r. 8, the solicitor could not have said that the claim against him ought to have been made in the interpleader proceedings, and his appeal would have failed apart from the provisions of Order XXXIII., r. 11.

(1) [1889] W. N. 224.

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Lush J.

When, however, we turn to Order XXXIII., r. 11, it seems to me that the matter is placed beyond controversy, for it says that in the case of remitted interpleader matters "no claim for damages shall be allowed in any such proceeding." Therefore upon the very terms of that rule the point raised by the appellant fails.

It is contended, however, that r. 11 is ultra vires, and s. 157 of the County Courts Act, 1888, has been referred to. Now if that section had been differently worded there might have been much force in the contention that a rule distinguishing county court matters from remitted matters would have been ultra vires, because when a matter has been remitted to the county court it becomes, in my opinion, for all purposes a county court matter. But s. 157 only enables the high bailiff to issue an interpleader summons and makes provision for dealing with any claim for damages arising out of an execution levied by him. In the present case the sheriff, and not the high bailiff, levied the execution and commenced the interpleader proceedings, and therefore s. 157 does not apply. The appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Edgar & Co.*

Solicitor for respondent: *W. J. Wenham, for Cushman & Cunningham, Brighton.*

J. H. W.

Ex parte STOTT.

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Nov. 4.

Certiorari—Licence for Cinematograph Exhibitions — Conditions of Licence — Objection to Conditions by Third Person—"Person aggrieved."

A licensing authority under the Cinematograph Act, 1909, granted to a theatre proprietor a licence for the exhibition of cinematograph films at his theatre. The licence was subject to the condition that the licensee should not exhibit any film if he had notice that the licensing authority objected to it. A firm who had acquired the sole right of exhibition of a certain film in the district in which the theatre was situated entered into an agreement with the licensee for the exhibition of the film at his theatre. The licensing authority having given notice to the licensee that they objected to the exhibition of the film, the firm applied for a writ of certiorari to bring up the notice to be quashed on the ground that the condition attached to the licence was unreasonable and void, and that they were aggrieved by the notice as being destructive of their property :—

Held, that, whether the condition was unreasonable or not, the applicants were not persons who were aggrieved by the notice and were not entitled to apply for a certiorari.

Application for a writ of certiorari.

In May, 1915, Walter Stott and Frederick White, carrying on business as hirers of cinematograph films, acquired for the sum of 3000*l.* the sole right of letting out on hire for exhibition a cinematograph film known as "Five Nights" in the counties of Lancashire, Yorkshire, and Derbyshire until December 31, 1924. Having so acquired that right they entered into an agreement with the proprietor of a cinematograph theatre in the town of St. Helens, known as the Hippodrome, to let the said film on hire for exhibition at that theatre for the week ending October 9 for the sum of 40*l.*

The justices of St. Helens, as delegates of the County Council of Lancashire, under s. 5 of the Cinematograph Act, 1909 (9 Edw. 7, c. 30), had granted to the proprietor of the Hippodrome a licence for cinematograph exhibitions on the premises subject to the following, amongst other, conditions: "No film shall be shown that is objectionable or indecent, or anything likely or tending to

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educate the young in the wrong direction, or likely to produce riot, tumult or breach of the peace, and no offensive representations of living persons shall be shown. Provided also that no film shall be exhibited if notice that the justices object to such film has been given to the licensee."

The intended exhibition of the film "Five Nights" having been advertised, the justices met and viewed it and afterwards passed a resolution that the film was objectionable and likely to educate the young in the wrong direction, and instructed their clerk to give notice to the proprietor of the Hippodrome that they objected to the exhibition of the film. That notice having been given, the proprietor of the Hippodrome cancelled the arrangements for the exhibition. Application was then made on behalf of Messrs. Stott and White to the Divisional Court for a rule nisi for a writ of certiorari to bring up the justices' notice prohibiting the exhibition to be quashed.

T. G. R. Dehn, for the applicants. The condition attached to the theatre proprietor's licence was ultra vires the licensing authority. It was unreasonable in that it prohibited the exhibition not only of improper or offensive films, but also of any films to which the justices thought fit to object, whatever the ground of their objection might be. There was no provision in the condition for the persons interested in the particular film being heard before the justices arrived at their decision. Consequently the notice given by the justices for the purpose of enforcing the condition was given without jurisdiction. The effect of it was to make it a criminal offence to produce a film on the merits of which the owners had never been heard. Then if the notice was bad the applicants are sufficiently persons aggrieved by it to entitle them to apply for a certiorari. For the prohibition of the exhibition was destructive of their right of property. In *Rex* v. *Groom* (1), where justices at an adjourned general annual licensing meeting granted to an applicant a licence to sell intoxicating liquors, and certain brewers, who were trade rivals of the licensee, objected that the licence was granted without jurisdiction, it was held that the objectors, notwithstanding that they had no interest in the particular house in respect

(1) [1901] 2 K. B. 157.

of which the licence was granted, had a sufficient interest in the decision of the justices to enable them to apply for a certiorari.

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AVORY J. The Cinematograph Act, 1909, by s. 2 authorizes the county council to grant licences for cinematograph exhibitions "on such terms and conditions and under such restrictions as subject to regulations of the Secretary of State the council may by the respective licences determine"; and by s. 5 authorizes the county council to delegate any of their powers under the Act to justices in petty sessions. Here the County Council of Lancashire had delegated to the justices of St. Helens their powers as the licensing authority under that Act, and the justices had granted a licence to the proprietor of the Hippodrome subject to the attached condition that "No film shall be shown that is objectionable or indecent, or anything likely or tending to educate the young in the wrong direction. Provided also that no film shall be exhibited if notice that the justices object to such film has been given to the licensee." The licensee accepted that licence with the condition, and he makes no complaint that it was ultra vires. But certain persons who are interested in the exhibition at that theatre of a particular film which has been objected to by the justices now ask for a certiorari calling on them to show cause why their notice of objection should not be quashed on the ground that the condition of the licence was too wide and therefore void. I may say that I think the last clause of the condition means that the justices may give notice of objection to a film where they have bona fide and in the judicial exercise of their discretion come to the conclusion that it is objectionable on one of the grounds mentioned in the previous part of the condition. If that is the true meaning of the condition the objection to it disappears. But, whether the condition is bad or not, and whether or not certiorari is applicable to such a notice, I think it is clear that the applicants are not persons who have sufficient interest in the licence to entitle them to apply for a rule. They are not in my opinion persons aggrieved by the notice.

ROWLATT J. I am of the same opinion. The mere fact that the justices' order prohibiting the exhibition deprived the applicants

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of the benefit of the contract that they had made with the licensee did not give them a right to complain that the justices' order was bad.

Rule refused.

Solicitor for applicants: *H. V. Harraway, for March, Pearson & Akenhead, Manchester.*

J. F. C.

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Nov. 4, 5.

WATKINS *v.* COTTELL.

Carrier—Furniture Remover—Whether liable as an Insurer—Person exercising a Public Employment.

The plaintiff employed the defendant, a furniture remover, to remove his furniture from one town to another. The defendant never carried furniture for a customer without first giving an estimate. Accordingly he went to the plaintiff's house and, having inspected the furniture, agreed upon the price of the removal. Beyond fixing the price nothing was said as to the terms of the removal. While the goods were in course of carriage on the defendant's lorry a fire broke out among them whereby they were damaged. The fire was not the result of any negligence on the part of the defendant. It was admitted that the defendant was not a common carrier, but the plaintiff claimed to recover the amount of his loss upon the ground that the defendant in carrying the goods was a person exercising a public employment, and as such impliedly took upon himself the liability of a common carrier:—

Held, that upon the above facts there was no evidence upon which it could be found that the defendant had taken upon himself that liability.

Liver Alkali Co. v. *Johnson* (1874) L. R. 9 Ex. 338 commented on.

APPEAL from the Bath County Court.

The defendant was a furniture remover at Bath, and in April, 1914, the plaintiff, who desired to have his furniture removed from Bath to Melksham, went to see the defendant about it. The defendant's practice, as the plaintiff knew, was never to carry furniture without first giving an estimate of the cost. He accordingly went to the plaintiff's house and inspected the furniture and agreed to remove it for the sum of 2*l.* 10*s.* Nothing else was said about the terms on which it was to be removed. The furniture

was in due course loaded on the defendant's lorry, and while it was in course of transit a fire broke out upon the lorry whereby some of the goods were totally destroyed and others damaged. The plaintiff brought his action in the county court for the loss so sustained, claiming to recover as damages the sum of 78*l.* 10*s.* At the trial the judge found as a fact that the fire did not originate through any negligence of the defendant, and he was not satisfied that it was caused by any negligence of the plaintiff in putting goods on the trolly which ought not to have been put there. It was admitted by the plaintiff that the defendant was not a common carrier, but he claimed to recover upon the ground that the defendant in carrying the goods was a person exercising a public employment, and as such impliedly took upon himself the liability of a common carrier. The county court judge accepted that contention, relying therefor upon the judgment of Blackburn J. in *Liver Alkali Co.* v. *Johnson* (1), and gave judgment for the plaintiff, the question of damages being adjourned. The defendant appealed.

Bromley Eames, for the appellant. The present case is distinguishable from *Liver Alkali Co.* v. *Johnson*. (1) There the defendant, a bargeowner, let out his barges for the conveyance of goods to any person who applied to him. The barges did not ply between fixed termini, but the hirer fixed the points of departure and arrival. A bargain was made on each occasion, the hirer paying at a specified rate per ton. In the course of the carriage of a cargo of salt cake for the plaintiffs on one of the defendant's barges the vessel sank without negligence on his part and the cargo was lost. It was held that the defendant was liable. In the Court of Exchequer (2) Kelly C.B., who delivered the judgment of the Court, went on the ground that he was a common carrier, and if that was the true view that case has no bearing on the present. But when that case went to the Exchequer Chamber Blackburn J., who delivered the judgment of the majority of the Court, declined to decide whether he was a common carrier in the sense that he would have been liable to an action for not taking goods tendered to him, but held that whether he was or not, inasmuch as he exercised a public employment of carriage, he had, in the absence of an express limitation

(1) L. R. 9 Ex. 338. (2) (1872) L. R. 7 Ex. 267.

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of his liability, taken upon himself the liability of a common carrier, and he accordingly affirmed the decision of the Court below. Brett J., however, though agreeing in the result, went on a different ground. He held definitely that the defendant was not a common carrier, but thought that he was liable as a shipowner "by a recognized custom of England." If the judgment of Blackburn J. is to be taken as deciding that the defendant there, although not a common carrier, was subject to a similar liability, it does not govern this case. For there the defendant held himself out as ready to let his barges out indifferently to any customer who applied to him, whereas here the defendant did not hold himself out as ready to carry for all comers. He required a preliminary inspection and estimate before he would agree to carry at all.

In the *Liver Alkali Case* in the Court below (1) Kelly C.B. said: "If each particular voyage had been made under a special contract containing stipulations applicable to that voyage only"—by which he obviously meant stipulations other than a mere adjustment of the price—"the case would have been different." Here there was a special contract in each case, whereas there there was not; the separate bargain which was stated to be made on each occasion was only a bargain as to the rate per ton to be paid for the hiring. The case of *Scaife* v. *Farrant* (2) is very like the present. There the defendant carried on the business of a furniture remover. The course of business was for him to inspect the customer's furniture before any contract for its removal was made, and after such inspection the price was fixed. The defendant having inspected the plaintiff's furniture agreed to remove it on the terms of his "undertaking risk of breakages (if any) not exceeding 5*l.* on any one article." While the furniture was being carried by the defendant it was accidentally burnt without any negligence on his part. The Exchequer Chamber held, affirming the Court of Exchequer, that he was not liable for the loss upon the ground that by the agreement as to limited liability for breakage he intended to exclude his liability as a common carrier in case of fire. But Denman J. went further, and said that, even if the agreement had not contained the reference to breakage, he would have held that the fact of the defendant requiring inspection and an estimate

(1) L. R. 7 Ex. 267. (2) (1875) L. R. 10 Ex. 358.

before agreeing to carry showed that he did not undertake the liability of a common carrier, and on that ground he distinguished the *Liver Alkali Case.* (1) He thought that in the case before him there was a special contract applicable to the particular journey within the meaning of the dictum of Kelly C.B.

Croom Johnson, for the respondent. The only question in this case is whether the defendant was "exercising a public employment." If he was, then according to the express decision of the Exchequer Chamber in *Liver Alkali Co.* v. *Johnson* (1), although he was not a common carrier and was not liable to an action if he refused to carry for a particular applicant, he impliedly took upon himself the liability of a common carrier in the absence of some stipulation expressly excluding that liability. Here the defendant did exercise a public employment; the judge has so found as a fact. Subject to an arrangement of the price he was just as ready to carry for any one who employed him as was the defendant in the *Liver Alkali Case.* (1) The only object of the inspection and estimate was to fix the price, and the fact that the defendant required such preliminaries cannot differentiate the two cases. There is no more a special contract in this case than there was in that. In that case the defendant did not hold himself out as ready to carry for all comers, but only as a bargeowner who was ready to enter into agreements with customers, and that is exactly what the defendant does here. The *Liver Alkali Case* (1) was followed in *Hill* v. *Scott.* (2) There the plaintiff handed a delivery order for wool to the defendant to be carried from London to Bradford. The defendant shipped the wool on board his steamer without any bill of lading, and during the voyage the wool was damaged by sea water. It was assumed that the plaintiff was not a common carrier, but it was held that he had undertaken a liability equal to that of a common carrier, and as he had not expressly or impliedly stipulated for any limitation of his liability he was liable without proof of negligence. In *Scaife* v. *Farrant* (3) there was a special bargain as to the terms of the liability, and not merely as to the price to be charged, as was the case here.

Bromley Eames in reply.

(1) L. R. 9 Ex. 338. (2) [1895] 2 Q. B. 371, 713.
(3) L. R. 10 Ex. 358.

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AVORY J. The plaintiff in this case employed the defendant to remove some furniture from Bath to Melksham. The defendant before undertaking the work inspected the furniture, and having done so agreed to remove it for the sum of 2*l.* 10*s.* There was no other express term in the contract. The defendant proceeded to execute the removal, and while his van containing the furniture was on the road a fire, from some unexplained cause, broke out among the goods, causing considerable damage. The plaintiff brings his action for the loss thereby occasioned. It was found as a fact by the county court judge that the fire did not originate through any negligence on the part of the defendant, and it was admitted by the plaintiff at the trial and also on the arguments before us that the defendant was not carrying on the business of a common carrier. But it was contended that the defendant, although not in fact a common carrier, had in relation to these goods undertaken the liability of a common carrier. The county court judge upheld that contention, and in support of his decision he relied mainly upon the case of *Liver Alkali Co.* v. *Johnson.* (1 Before proceeding to consider the judge's judgment and the case on which he so relied I think it well to state what I understand by the term "common carrier." The following definition, which I take from a well-known text-book (2), seems to me to be accurate: "A common carrier is a person who undertakes for hire to transport from a place within the realm to a place within or without the realm the goods or money of all such persons as think fit to employ him. To render a person liable as a common carrier he must exercise the business of carrying as a public employment, and must undertake to carry goods for all persons indiscriminately, and hold himself out, either expressly or by course of conduct, as ready to engage in the transportation of goods for hire as a business, not merely as a casual occupation pro hac vice." On the other hand a "private carrier," which term includes every person carrying for hire who is not a common carrier, is defined to be "a person whose trade is not that of conveying goods from one person or place to another, but who undertakes upon occasion to carry the goods of another and receives a reward for so doing." (3)

(1) L. R. 7 Ex. 267; 9 Ex. 338.
(2) Macnamara on Carriers by Land, 2nd ed., p. 11.
(3) Ibid., p. 6.

Now I doubt whether the plaintiff could succeed in this case when once it had been admitted that the defendant was not a common carrier unless he could prove that there were express terms in the contract rendering him liable to the same extent as if he were a common carrier, that is to say as an insurer, and it is not suggested that there were any such express terms in the contract. But it is said that there is a third class of persons who are under the liability of a common carrier, namely, persons who exercise a public employment of carrying goods for hire. I very much doubt whether there is any such third class as distinct from common carriers. I should have thought that if a man exercises his employment in such a way as to incur the liability of a common carrier he is a common carrier. The county court judge seems to have thought that the *Liver Alkali Co. Case* (1) was based upon the existence of such a third class, but for reasons which I will give I do not think that that was the ground of the decision. It was contended by the defendant's counsel that, even if it was, the present case was distinguishable on the ground that here there was a special contract in each case by which the defendant fixed the price to be charged, and reliance was placed upon the judgment of Kelly C.B. in the Court below (2) where he said: "If each particular voyage had been made under a special contract containing stipulations applicable to that voyage only the case would have been different." To that the county court judge answered that there were here no specified stipulations, but only ordinary stipulations as to price, which equally existed in the *Liver Alkali Case* (1), where it was found that "a separate bargain is made on each occasion, the employer paying a specified rate per ton." He said: "The defendant's terms of business were to accept a contract from any one who applied for the removal of furniture subject to his estimate as to price being accepted." With that view I cannot agree. I think there was here something much more important than a stipulation as to price. There was a preliminary requirement that the goods should be inspected before any agreement was entered into for their carriage. The defendant was not a person ready to carry the goods of any one at so much per ton, but one who stipulated that he should have inspection of the goods before he could undertake to carry them at all. In this Court we have power

(1) L. R. 7 Ex. 267; 9 Ex. 338. (2) L. R. 7 Ex. at p. 269.

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to draw inferences of fact such as might have been drawn in the Court below. I think the judge drew a wrong inference as to the terms of the defendant's business when he said that he was ready to accept the goods of any one. I think that there is not the slightest evidence of that. As the judge based his judgment on the *Liver Alkali Case* (1) it is necessary to examine that case and see whether it offers any support to the plaintiff's proposition. In my opinion the view of that case which has been put before the Court is somewhat misleading owing to insufficient attention to the original judgment in the Court of Exchequer. There the defendant was a lighterman who let out his vessels "to any one who chose to hire them," and there was no evidence "of any refusal on the part of the defendant to allow any applicant to hire." The defendant did not ply between fixed termini, and each voyage was made under separate agreement, the employer paying at a specified rate per ton. Under those circumstances the Court held that he was a common carrier. That was the whole contention of the plaintiff's counsel; and Kelly C.B., in delivering the judgment in which Martin, Bramwell, and Cleasby BB. concurred, said: "I feel constrained to assent to the neat and precise argument of Mr. James, and to hold that there was evidence that the defendant was a common carrier." The only question was whether it made any difference that he did not ply between fixed termini and did not carry more than one person's goods at a time, and it was held that it did not. That being the decision of the Exchequer, the case went to the Exchequer Chamber, where the judgment of the Court below was affirmed. It is true that Blackburn J., in delivering a judgment in which Mellor, Grove, and Archibald JJ. concurred, uses language which might appear to give some countenance to the present plaintiff's contention, where he says: "We have purposely confined our expressions to the question 'whether the defendant has the liability of a common carrier,' for we do not think it necessary to inquire whether the defendant is a carrier so as to be liable to an action for not taking goods tendered to him." But after stating the facts as found, and that the defendant carried for any one who chose to employ him, he added: "We think that this describes the ordinary employment of a lighterman, and that,

(1) L. R. 7 Ex. 267; 9 Ex. 338.

both on authority and principle, a person who exercises this business and employment does, in the absence of something to limit his liability, incur the liability of a common carrier in respect of the goods he carries." He concludes by saying that "the judgment below was right." Brett J., who gave a separate judgment, agreed in affirming the Court below, but on a different ground. He thought that the defendant was not a common carrier, but that, being a shipowner, he was subject by the custom of England to a similar liability, and that in the absence of express limitation he carried his employers' goods at his own absolute risk. In my opinion the effect of the judgment of the majority of the Court in that case was that the defendant was a common carrier. And that is the view which was taken of that case by Cockburn C.J. in *Nugent* v. *Smith* (1), where he said: "The Court of Exchequer Chamber held, affirming the judgment of the Court of Exchequer, that the defendant was a common carrier and liable as such." But however that may be, that case appears to be no authority for holding that a furniture remover who does not hold himself out as ready to carry for any one who applies, but before carrying requires to inspect the furniture and makes a special contract as to its carriage, thereby takes upon himself the liability of a common carrier. I have therefore come to the conclusion, first, that there was no evidence that the defendant undertook the liability of a common carrier, and, secondly, that the county court judge misdirected himself in holding himself bound by the case of *Liver Alkali Co.* v. *Johnson* (2) to decide as he did.

ROWLATT J. I am of the same opinion. It is admitted that the defendant was not a common carrier, but it is said that he is liable because he had contracted upon the footing of taking on himself the liability of a common carrier. That suggested liability is traceable to the case of *Liver Alkali Co.* v. *Johnson*. (2) That was a case in which the carrier held himself out as ready to carry for any one who applied, and in view of that fact the Court of Exchequer held that he was a common carrier. It is true that on each occasion

(1) (1876) 1 C. P. D. 423, at p. 433. (2) L. R. 7 Ex. 267; 9 Ex. 338.

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Rowlatt J.

of hiring he made a separate bargain, the employer paying a specified rate per ton. But I understand the meaning of that finding to be that the separate bargain was confined to the fixing of the price, and that subject thereto the terms of the contract of carriage were left unexpressed for the law to imply. This seems clear from what Kelly C.B. says at p. 269: "No doubt, if each particular voyage had been made under a special contract containing stipulations applicable to that voyage only the case would have been different." When that case came before the Exchequer Chamber (1) there was a difference of opinion as to the ground on which the defendant was to be held responsible. Blackburn J. took one view and Brett J. another. Blackburn J., after referring to the facts, said, at p. 340: "We think this describes the ordinary employment of a lighterman, and that, both on authority and principle, a person who exercises this business and employment does, in the absence of something to limit his liability, incur the liability of a common carrier in respect of the goods he carries." What I understand him to mean is that although a shipowner who lets out the whole carrying capacity of his vessel to a particular person is not a common carrier, yet if, having arranged the amount of the freight, he is silent as to the terms on which the goods are to be carried, he impliedly undertakes to carry them on the same terms as a common carrier would, for in so carrying them he is assuming the role of a common carrier. Personally I find a difficulty in seeing that there is any distinction in substance between so assuming the liability of a common carrier and being a common carrier. The distinction seems to me to be largely a matter of words. When that case came to be considered in the Court of Appeal in *Nugent* v. *Smith* (2) Cockburn C.J. took the view that "the Court of Exchequer Chamber held, affirming the judgment of the Court of Exchequer, that the defendant was a common carrier and liable as such." At the same time he added: "I cannot help seeing the difficulty which stands in the way of the ruling in that case, namely, that it is essential to the character of a common carrier that he is bound to carry the goods of all persons applying to him, while it never has been held, and, as it seems to me, could not be held, that a person who lets out vessels or vehicles to individual customers on their application was liable to an action

(1) L. R. 9 Ex. 338. (2) 1 C. P. D. 423.

for refusing the use of such vessel or vehicle if required to furnish it." It was argued here by the appellant that even if that is not the true ground of the decision in *Liver Alkali Co.* v. *Johnson* (1), and if a person can be liable as a common carrier who is not in fact a common carrier, that doctrine at all events has never been applied to carriers by land. But that is a matter with which, in the view that I take of the doctrine itself, it is unnecessary for me to deal.

In the present case there is no dispute as to the facts. The defendant was an ordinary remover of household furniture, who being applied to by the plaintiff to remove his furniture agreed to do so for a certain sum after he had inspected the goods. On those facts I do not think that there was any evidence on which the judge could hold that the defendant undertook the liability of a common carrier. Some light is thrown on this question by the case of *Scaife* v. *Farrant.* (2) That was a case of furniture removal, and the defendant agreed to remove the plaintiff's furniture on the terms of the defendant "undertaking risk of breakages, if any, not exceeding 5*l.* on any one article." The goods, as in the present case, were destroyed in transit by fire without any negligence on the part of the defendant. The Court held that the agreement was intended to limit the defendant's liability to loss by breakage or by the defendant's negligence, and excluded any question of liability as a common carrier. There, as here, the defendant was ready to carry for all persons indifferently who applied to him, but the course of business was, as here, for an inspection of the furniture to take place before any contract was made, and for the price to be fixed after such inspection; and on those facts Denman J. said: "I come to the conclusion that the defendant did not so deal with the public as to undertake to carry goods in the absence of an agreement as to the terms of carriage." Cockburn C.J., said that had it not been for the terms of the special agreement limiting the liability of the defendant he would have felt bound "to enter into the question whether the defendant was a common carrier at all." That case shows that the judges there regarded a contract of furniture removal as standing on a different footing from an ordinary contract of carriage, and that it was not one in which the

(1) L. R. 9 Ex. 338. (2) L. R. 10 Ex. 358.

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remover impliedly took upon himself the liability of a common carrier. In my opinion this appeal must succeed.

Judgment for the appellant.

Solicitors for appellant: *Church, Adams & Prior, for A. E. Withy, Bath.*

Solicitors for respondent: *Ricketts, Son & Vezey, Bath.*

J. F. C.

1915
Nov. 2.

LONDON AND NORTHERN ESTATES COMPANY *v.* SCHLESINGER.

Alien Enemy—Contract—Implied Basis of—Tenancy of House—Tenant an Alien Enemy —Aliens Restriction Order—Tenant prohibited from residing in District—Liability for Rent.

The plaintiffs before the outbreak of the war let to the defendant, an Austrian subject, a residential flat at W. for a term of years. By the terms of the agreement the defendant was not to assign or underlet the premises without the lessors' licence, such licence not to be unreasonably withheld. On war breaking out the defendant became an alien enemy. By an Order in Council alien enemies were prohibited from residing within certain specified areas, including W.

In an action to recover rent accrued due in respect of the flat since the date of the Order:—

Held, that it was not the basis of the contract of tenancy that the defendant should continue to be allowed by law to inhabit the flat in person; that the Order consequently had not the effect of extinguishing the tenancy; and that the defendant was liable for the rent.

APPEAL from the Mayor's Court.

By an agreement of tenancy dated March 19, 1914, the plaintiffs let to the defendant, an Austrian subject, a residential flat at Westcliffe-on-Sea for a term of three years from Lady Day, 1914. The agreement provided that "The tenant will occupy the said rooms only as private dwelling rooms," and "will not assign or underlet the said suite of apartments and premises without first obtaining

the consent in writing of the landlords which shall not be unreasonably withheld."

In August, 1914, war broke out and the defendant became an alien enemy. By s. 18 of the Aliens Restriction (Consolidation) Order made by His Majesty in Council on September 9, 1914, under the powers conferred by the Aliens Restriction Act, 1914, it was provided that "An alien enemy shall not enter, or reside or continue to reside, either temporarily or permanently, in any of the areas specified in the Second Schedule of this Order (in this Order referred to as prohibited areas) unless provided with a permit issued by the registration officer of the district, subject to the general or special instructions of the Secretary of State." Amongst the prohibited areas specified in the said schedule is the county borough of Southend, which includes Westcliffe-on-Sea. And by s. 28, "If any person aids or abets any person in any contravention of this Order . . . . he shall be deemed himself to have acted in contravention of this Order." The action was brought to recover the rent of the flat for the quarter expiring at Lady Day, 1915. The defendant contended that by reason of the said Order in Council the tenancy was determined as from the date of the Order. The Common Serjeant overruled the contention and gave judgment for the plaintiffs. The defendant appealed.

Inskip, K.C., and *Wertheimer*, for the appellant. The intention of the parties to the agreement was that the tenant should personally reside in the premises. That appears from the clauses which provided that he should occupy the rooms as private dwelling rooms, and that he should not assign or sub-let without licence. That was the foundation of the contract. That being so, the performance of the contract was rendered impossible by the Aliens Restriction Order. That Order by s. 18 made it illegal for the tenant to reside there, and by s. 28 for the lessors to abet him in so doing. Performance being rendered impossible without any default in the tenant, the contract was put an end to, and the liability to pay rent was extinguished. The case falls within the principle of *Krell* v. *Henry* (1), where the defendant took a flat in Pall Mall for the days on which it was announced that coronation processions would pass

(1) [1903] 2 K. B. 740.

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along that street. As the processions did not take place on those days it was held that the defendant was discharged from his obligation to pay the stipulated rent, upon the ground that the taking place of the processions on those days was the foundation of the contract, and that the event which prevented the performance of the contract was of such a character that it could not reasonably have been said to have been in the contemplation of the parties at the date of the contract. And in *Jackson* v. *Union Marine Insurance Co.* (1) Brett J. laid it down as a proposition supported by the authorities that " Where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable to or impossible of application to any such circumstances, it ceases to have *any* application ; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made." Here it could not possibly have been in the contemplation of the parties in March, 1914, that the tenant might be prohibited by law from inhabiting the flat.

J. B. Matthews, K.C., and *Beachcroft*, for the respondents. The distinction between the present case and *Krell* v. *Henry* (2) is that here the personal residence of the appellant in the flat was not the foundation of the contract. It was not the only benefit that he was to get in return for the rent. He could assign or sub-let to any person to whom the lessors could not reasonably object. Again, if he had wished to leave his furniture in the flat and to pay the rent while he lived somewhere else, the lessors could not have treated the lease as cancelled and relet it against his will to some one else. The mere prohibition of his personal residence did not involve a total failure of consideration.

Inskip, K.C., in reply.

AVORY J. In this case an agreement for the tenancy of a flat was made with an Austrian, a person who is now an alien enemy. After that agreement had been entered into it became unlawful for the tenant to reside either temporarily or permanently in that flat by reason of the Aliens Restriction (Consolidation) Order, 1914. It also became unlawful for any person to aid or abet him in residing

(1) (1873) L. R. 8 C. P. 572, at p. 581. (2) [1903] 2 K. B. 740.

there; and the only question is whether that Order has the effect of putting an end to the agreement of tenancy so as to discharge the tenant from his obligation to pay the rent. It has been contended on his behalf that it has; that the agreement between the two parties was that he should reside there; and that the Order has rendered the performance of that agreement impossible. I am content in answer to that argument to adopt the language of the Common Serjeant in giving judgment in this case; he says: "By the lease the defendant had a right to the personal occupation of the premises, and the right to assign or sub-let them to another person in the absence of any reasonable ground for objection. This latter right was of value and might even enable the defendant to let the premises at a profit to himself, and this right was not affected by the Aliens Restriction Order. That Order and the statute under which it was made did not avoid the lease, or make it illegal for an alien enemy to hold a lease of land in a prohibited area. This being so the lease is not extinguished, nor is the defendant's title as tenant under it put an end to although his personal enjoyment of the premises under it is prohibited." I do not think that I can usefully add anything to that statement. I entirely agree with it, and will only say this, that the right to sub-let is only one of the modes of enjoyment of the premises which are left to the tenant in the event of his being prevented from personally residing there. It is clear that if he had desired to lend the flat to any of his friends there was nothing in the Order to prevent him from doing so. The appeal must be dismissed.

LUSH J. I agree. Even if we regard this agreement of tenancy as a contract and nothing more I think that the appellant's contention fails. In order to succeed he would have to prove that his personal residence in the flat was, to use the language of Vaughan Williams L.J. in *Krell* v. *Henry* (1), "the foundation of the contract." In my opinion there is no ground whatever for saying that his personal residence was the foundation of the contract. No doubt it probably was his purpose in taking the flat, but that is not the sense in which the expression "foundation of the contract" has been used in this connection. In *Krell* v. *Henry* (1) the parties

(1) [1903] 2 K. B. 740.

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contracted upon the basis that the rooms were only to be occupied by the defendant for the purpose of witnessing the expected coronation procession, and that in the event of there being no such procession he was not to have any right to occupy them at all. But here the consideration for which the appellant agreed to pay the rent was not confined to his right of personally residing in the flat; he obtained the right, subject to certain conditions, to assign or sub-let the premises to other persons. As the contract could be performed without his personal residence, the fact that his personal residence was prohibited by the Order did not make the performance of the contract impossible. But there is, I think, a further answer to the contention. It is not correct to speak of this tenancy agreement as a contract and nothing more. A term of years was created by it and vested in the appellant, and I can see no reason for saying that because this Order disqualified him from personally residing in the flat it affected the chattel interest which was vested in him by virtue of the agreement. In my opinion it continues vested in him still. For these reasons I think the judgment of the Common Serjeant should be affirmed.

Appeal dismissed.

Solicitors for appellant: *Oppenheimer, Blandford & Co.*
Solicitor for respondents: *H. Kempson Reeves.*

J. F. C.

HOOLE URBAN DISTRICT COUNCIL *v.* FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

1915
Nov. 15.

Principal and Surety—Bond for due Performance of Contract—Litigation between Parties to Contract — Contractor ordered to pay Costs — Liability of Surety.

A contractor entered into a contract with the plaintiffs for the execution by him of certain works. The contract did not contain any agreement by the contractor that, in the event of litigation arising between him and the plaintiffs in connection with the performance of the contract and of his failing in that litigation and being ordered to pay the costs, he would pay them. The defendants, as sureties for the contractor, gave a bond to the plaintiffs conditioned for the due performance by the contractor of his contract. Litigation having arisen between the plaintiffs and the contractor as to the performance of the contract, judgment was given against the contractor and he was ordered to pay the costs. The plaintiffs sued the defendants on their bond for the amount of the costs :—

Held, that, as the liability of the contractor to pay the costs arose not under the contract but under the judgment, the defendants were not liable.

Trial of action before Bailhache J. without a jury.

By a contract dated September 24, 1912, W. H. Owen, therein called the contractor, agreed with the Hoole Urban District Council to execute for them certain sewerage works in accordance with the specification thereto annexed. By terms of the contract the contractor was to find good and substantial sureties for the due fulfilment by him of his contract, and accordingly the defendants, the Fidelity and Deposit Company of Maryland, gave to the plaintiffs a bond, bearing even date with the contract, whereby they bound themselves in a sum of 500*l.*, the condition of the bond being that the contractor should "well and truly perform fulfil and keep all and every the clauses terms conditions and stipulations in the said recited contract." The said terms and stipulations did not include any express agreement by the contractor that, in the event of litigation arising between him and the council in connection with the performance of the contract and of his failing in that litigation and being ordered to pay the costs, he would pay them. The contractor

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failed to carry out the work satisfactorily, and by reason of his neglect in the laying of the sewer injury was done to certain gas and water mains, and property belonging to third persons was damaged. He also failed altogether to complete certain of the works contracted for. Disputes arose between the contractor and the district council, and he brought an action against them claiming that a sum of 603*l.* was due to him under the contract. The council admitted that a sum of 152*l.* was due to him, and they paid that money into Court, but they denied that he was entitled to any more. They also counterclaimed for 329*l.* damages for breach of his contract, in respect of the damage done to the property of the third persons whose claims the council had to satisfy, and in respect of the contract works which he failed to complete. The action was referred to an arbitrator by consent, and the arbitrator by his award made on September 1, 1914, found that the contractor was entitled to recover upon his claim the sum of 152*l.* so paid into Court and no more, and that the council were entitled to recover upon the counter-claim the 329*l.* damages claimed. He accordingly entered judgment for the council for the balance of 177*l.* and costs. The costs were taxed and allowed at 398*l.* That sum when added to the 177*l.* damages amounted to 575*l.*, a sum which was in excess of the amount secured by the bond. The council then brought this action against the Fidelity and Deposit Company of Maryland upon their bond claiming the 500*l.* thereby secured. The defendants did not dispute their liability to pay to the plaintiffs the 177*l.* damages, but denied their liability for the costs.

Caradoc Rees (*Leslie Scott, K.C.*, with him), for the plaintiffs. The defendants' bond was conditioned for the due fulfilment by the contractor of his contract; that is to say, they undertook that, in the event of his failing to fulfil it, they would pay everything for which the contractor would be liable as the natural consequences of the breach. Among those natural consequences is to be included the liability to pay costs reasonably incurred in enforcing a claim against him for damages. That liability may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as a probable result of a breach. It was the intention of the bond that the sureties should be liable for the costs

of possible litigation. In *In re Graham* (1), where the question was as to the extent of the liability of the surety of a receiver, and the recognizance was in the form given in Appendix L to the Rules of the Supreme Court, the condition being that the receiver should duly account for the money received by him on account of the rents and profits of the estate at such periods as the Court should appoint and duly pay the balance which from time to time should be certified to be due from him, Chitty J. cited with approval a passage from Kerr on Receivers; he said: "Mr. Kerr in his book states that 'the surety is answerable to the extent of the amount of the recognizance for whatever sum of money, whether principal, interest, or costs, the receiver has become liable for, including the costs of his removal, and of the appointment of a new receiver in his place'; and in my opinion that is a correct general statement of the principle on which the Court proceeds." If the costs occasioned by a receiver's misconduct are not too remote, neither are the costs occasioned by the contractor's breach of contract here. In *In re Lockey* (2) a bond was given by sureties of the committee of a lunatic's estate, the condition being that the committee should obey the orders of the Lord Chancellor with respect to the estate. The committee was guilty of disobedience, and was ordered by the Lord Chancellor to pay the costs of proceedings taken against him to enforce obedience. On his failure to pay the costs the sureties were held liable for them under their bond.

Roche, K.C., and *H. A. McCardie*, for the defendants. The condition of the defendants' bond being that the contractor shall fulfil his contract, they are liable under that bond to pay costs only if the non-payment of the costs by the contractor was a breach of his contract. But that contract was silent on the subject of costs, and it cannot be read as containing an implied undertaking to pay any costs that may be ordered against him in any litigation arising out of the contract. The costs which he was liable to pay were payable not under any agreement but under the arbitrator's order, and for a breach of that order the defendants are not liable under their bond. The cases relied on are not in point. In *In re Graham* (1) the bond was in a very different form from the present; it provided that the receiver should "duly pay the balances

(1) [1895] 1 Ch. 66. (2) (1844) 1 Phill. 509.

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which from time to time shall be certified to be due from him," which balances would include costs if there were any. In *In re Lockey* (1) the costs which were ordered to be paid by the Lord Chancellor were within the very letter of the bond.

Caradoc Rees in reply. It is not disputed by the defendants that they are liable to pay the damages for which the contractor was liable. But those damages were payable under the arbitrator's award just as much as the costs. The damages, like the costs, were payable because they were the natural consequence of the breach of contract, and not because there was any agreement to pay them. Both stand on precisely the same footing.

BAILHACHE J. This is an action upon a bond which is annexed to a contract for the execution of certain sewerage works and is dated September 24, 1912. It is a bond given by the defendants to the plaintiffs in the sum of 500*l.*, the condition of the bond being that the contractor, a man named Owen, should duly fulfil his contract with the plaintiffs, the contract being of even date with the bond. As the contract approached completion disputes arose, as not unfrequently happens in such circumstances, between the contractor and the district council as to whether the contract had been duly fulfilled or not. The contractor brought an action against the district council in which he claimed a sum of 603*l.* The council admitted liability for 152*l.* and disputed liability for the balance. They also counterclaimed against the contractor in respect of a certain liability to third parties and in respect of damages for works uncompleted. Shortly after the commencement of the action it was apparent that it was a case which had better be dealt with by arbitration than by an action, and by consent the whole matter was referred to an arbitrator. The result of the arbitration was that the contractor recovered no more of his claim than the 152*l.* which the council had admitted, and the council recovered on their counterclaim 329*l.*, so that on the balance of those figures there was due from the contractor to the council the sum of 177*l.* The arbitrator also awarded to the council their costs of the action and the arbitration, which costs were taxed at 398*l.* That sum when added to 177*l.* damages made a sum of 575*l.*, which exceeded the amount of the

(1) 1 Phill. 509.

bond. The council accordingly claim that they are entitled to recover from the defendants the whole amount of the bond in respect of the damages and costs. The defendants admit their liability for the 177*l.* damages, but deny their liability for the costs. The council say that it is in the natural order of things that when a contract of this description comes to be finished there should be disputes between the contractor and the employer, and that upon such disputes arising it is a reasonable thing to submit them to arbitration, and they say that these costs were incurred as the result of a reasonable course of conduct which must have been in the contemplation of the parties when they made the contract, and they ask that those costs may be added to and form part of the damages which are due to the council under the contract. I think there is a good deal of truth in that. I have no doubt that the course taken by the council was a reasonable course, and I think that if before any of the costs had been incurred they had given the defendant company notice of the nature of the disputes with the contractor and of the proposed arbitration, and the defendants after receipt of such notice had either expressly, or impliedly by their conduct, requested the council to proceed with the arbitration, they might have rendered themselves liable for the costs; though that liability would not have been based on the conditions of the bond, but would have been an independent cause of action arising out of the express or implied request. Here no such notice was given and there was no express or implied request, and we have therefore to see whether the defendants are liable under the terms of the bond. Now the condition of the bond is that the contractor shall perform, fulfil, and keep all the terms, conditions, and stipulations of the contract. The question, therefore, is whether the failure by the contractor to pay the costs was a breach of his contract. As a rule when costs are to be paid as the result of an action or of proceedings before an arbitrator they fall to be paid by reason of the judgment given in the action or of the arbitrator's award, and not by reason of a stipulation in the contract out of which the dispute arose which formed the subject-matter of the action or reference. I have looked carefully through this contract and have been unable to find any contractual undertaking by Mr. Owen to pay any costs which might be awarded against him. Under those circumstances

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I have come to the conclusion that I cannot add the costs to the amount of the damages that were awarded and make the defendants pay the costs under their bond. There must therefore be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Austin & Austin, for A. E. Caldecutt, Chester.*

Solicitors for defendants: *Broad & Co.*

J. F. C.

C. A.

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Nov. 4, 5.

[IN THE COURT OF APPEAL.]

THAMES AND MERSEY MARINE INSURANCE COMPANY *v.* BRITISH AND CHILIAN STEAMSHIP COMPANY.

Insurance (Marine)—Ship valued in Policy at less than Real Value—Collision Action—Loss recovered by Assured on Basis of Real Value—Subrogation of Underwriters paying on Total Loss—Extent of their Rights against Assured.

A ship was insured for 45,000*l.* on an agreed value of 45,000*l.* As the result of a collision with another ship she was sunk, and the underwriters paid the amount insured as for a total loss. In an action of collision in the Admiralty Division both ships were held to blame, and the owners of the insured ship were held entitled to recover from the owners of the other ship five-twelfths only of their loss. For the purposes of that judgment the value of the ship was taken at its actual value, which was 65,000*l.*, and the assured were paid five-twelfths of that sum. The underwriters claimed to be subrogated to the rights of the assured in respect of the amount so recovered:—

Held, that as the amount so recovered by the assured did not exceed the amount paid by the underwriters on the policy, the underwriters were entitled to recover from the assured the whole of the amount recovered by them in the admiralty action notwithstanding that it was based upon a value which was higher than that agreed in the policy.

Decision of Scrutton J. [1915] 2 K. B. 214 affirmed.

APPEAL of the defendants from the decision of Scrutton J.; reported [1915] 2 K. B. 214.

By a policy of marine insurance dated June 6, 1912, the plaintiffs insured the defendants' ship *Helvetia*, valued at 45,000*l.*, against

the ordinary perils to the extent of 1800*l.* for twelve months from May 20, 1912, the balance of the 45,000*l.* being insured with other underwriters. The policy contained the usual collision clause. On July 27, 1912, the *Helvetia* sank after a collision with the *Empress of Britain* and became a total loss. A collision action was brought in the Admiralty Division, in which both ships were held to blame, the *Helvetia* being held liable to pay seven-twelfths of the damage, and the *Empress of Britain* five-twelfths. After the judgment in that action the underwriters on the *Helvetia* paid a total loss. At the time of the loss the *Helvetia* was chartered to the Dominion Coal Company for a period of seven St. Lawrence seasons, commencing with the spring of 1911. The claim of the owners of the *Helvetia* was subsequently filed, in which they claimed 75,000*l.* for the value of the ship and 24,320*l.* for loss of profit on the charter. The registrar valued the *Helvetia* as in November, 1912, at the end of the current St. Lawrence season, at 65,000*l.*, and the value of the charterparty at 2000*l.* from the time of the loss up to November 15, 1912. On appeal the President held that the damages had been assessed upon a wrong footing, and that, on the principle laid down in *The Racine* (1), the value of the ship should have been taken at its prospective value at the expiry of the charter in November, 1917, and the value of the charterparty as being the profits for the five seasons that it had to run, and he sent the matter back to the registrar for assessment on that basis. The parties then effected a compromise and agreed that 67,000*l.* should be taken as representing the aggregate of the value of the ship and that of the charterparty, without specifying how they were to be apportioned. A sum of 26,900*l.*, which represented five-twelfths of 65,000*l.*, less certain costs and other charges, was paid to the defendants by the owners of the *Empress of Britain*.

The plaintiffs claimed to be subrogated to the rights of the defendants in that sum after giving them credit for a sum of 19,660*l.* which was due from the plaintiffs to the defendants under the collision clause in the policy. The difference between those two sums was 7240*l.*, and this sum was accordingly brought to recover 289*l.* 11*s.* 7*d.*, which represented the plaintiffs' proportion of 7240*l.*

The defendants contended that the plaintiffs were bound by the

(1) [1906] P. 273.

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valuation of the *Helvetia* as agreed in the policy, and were not entitled by way of subrogation to more than their proportion of five-twelfths of the amount of such valuation, on which basis, after the plaintiffs had been debited with their proportion of the loss due to the defendants under the collision clause, nothing remained due to the plaintiffs.

Scrutton J. held that, as the amount recovered by the assured did not exceed the amount paid by the underwriters on the policy, the underwriters were entitled to recover from the assured the whole of the amount recovered by them in the admiralty action, notwithstanding that it was based upon a value which was higher than that agreed in the policy.

The defendants appealed.

Leslie Scott, K.C., and *W. N. Raeburn*, for the defendants.

Maurice Hill, K.C., and *D. Stephens*, for the plaintiffs.

No argument was addressed to the Court upon the point decided by Scrutton J. and reported at [1915] 2 K. B. 214. The arguments in the Court of Appeal were limited to the question of fact how much was recovered in the collision proceedings by the assured in respect of the subject-matter insured, i.e., the ship.

The COURT (Swinfen Eady L.J., Phillimore L.J., and Pickford L.J.) formally affirmed the decision of Scrutton J. upon the point reported below, and upon the point of fact referred the case to an official referee for inquiry as to how the amount recovered ought to be apportioned between the shipowners and charterers, upon the basis of the judgment of the President of the Admiralty Division.

Solicitors for plaintiffs: *Alfred Bright & Sons, for Batesons, Warr & Wimshurst, Liverpool.*

Solicitors for defendants: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

W. J. B.

CRANE *v.* SOUTH SUBURBAN GAS COMPANY.

1915
Nov. 1.

Highway—Nuisance—Negligence—Repair of Gas Main—Dangerous Act—Fire and Molten Lead on Land adjacent to Highway—Injury to Child.

Workmen employed by the defendants, a gas company, for the purpose of carrying out repairs to a gas main in a highway placed a fire pail, on which was a ladle containing molten lead, on unenclosed land adjacent to the highway. The plaintiff, a young child, was playing with other children near the fire when a passer-by accidentally knocked over the fire pail, and the molten lead was spilled on the plaintiff, causing her injury. In an action by the plaintiff to recover damages the county court judge found that the defendants were guilty of negligence in leaving the fire unattended and unguarded with the knowledge that it was surrounded by children and that it was being used for molten lead :—

Held, that there was evidence on which the county court judge could find that the defendants were negligent; and that the defendants were also liable on the ground that what they were doing was a nuisance in that it was dangerous unless precautions were taken to guard persons using the highway from the danger.

APPEAL from the county court of Kent holden at Dartford.

The plaintiff, a young child, suing by her next friend, claimed damages for personal injuries sustained by her through the negligence of the defendants' servants, or alternatively by reason of a nuisance committed by the defendants.

On January 6, 1915, the defendants were engaged, in pursuance of their statutory powers, in the repair of a gas main in a public highway called Brook Street. It was necessary for the purpose of the work to use molten lead. The defendants' workmen placed a fire pail on the unfenced forecourt of a house, adjoining the footpath of Brook Street, to which the public had access. The spot where the fire pail was placed was a few feet from the footpath. On the fire was a ladle containing molten lead. The plaintiff and other children were playing in the vicinity of the fire, when a boy passing by accidentally knocked over the fire pail, and some of the molten lead was spilled over the plaintiff's foot, causing her injury. The defendants' workmen in their evidence said that they had told the children several times to keep away from the fire. In the earlier part of the day one of the workmen had been engaged

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in looking after the fire, but at the time of the accident all the men were working in the trench in the roadway.

The county court judge found that the defendants were guilty of negligence in leaving a fire of this character unattended and unguarded with the knowledge that it was surrounded by young children and that it was being used for molten lead. He gave judgment for the plaintiff for 25*l.*

The defendants appealed.

Morton Smith, for the defendants. There was no evidence on which the county court judge could find that the defendants had been negligent. Negligence involves a breach of duty. There was no duty on the defendants, as the county court judge seems to have thought, to have a guard round the fire; it was not a trap, for it could be seen and avoided by the persons using the highway. The defendants had a statutory right to have the fire on the highway or on the land adjacent to it, because it was necessary and reasonable for them to carry out the work of repairing the gas main in that way. If an adult had been injured by the upsetting of the fire there would clearly have been no cause of action. It makes no difference that the plaintiff was a young child. If there was in the circumstances a special duty towards the plaintiff as a child, the evidence showed that the duty had been discharged by the repeated warnings given to the children to keep away from the fire. *Cooke* v. *Midland Great Western Railway of Ireland* (1) was a case of invitation: see *Latham* v. *Johnson* (2); *Jenkins* v. *Great Western Ry. Co.* (3) The placing of the fire in the forecourt was not an invitation to the plaintiff to play round it. If there was any evidence of negligence on the part of the defendants' servants, the proximate cause of the injury to the plaintiff was not that negligence, but the intervening act of the boy in knocking over the fire pail. [He also referred to *Burchell* v. *Hickisson* (4); *M'Lelland* v. *Johnstone.* (5)]

Cassells, for the plaintiff. The plaintiff's claim is framed in the alternative, either for negligence or nuisance. When a man is

(1) [1909] A. C. 229.
(2) [1913] 1 K. B. 398.
(3) [1912] 1 K. B. 525.
(4) (1880) 50 L. J. (C.P.) 101.
(5) (1902) 4 F. 459.

doing something on a highway which is or may be dangerous to persons lawfully using the highway he must take reasonable care to protect those persons, and if he fails to do so it makes no difference that the injury was caused by the intervention of a third party. On the evidence it was open to the county court judge to find that the defendants were negligent in not providing a guard or screen for the fire.

Morton Smith replied.

AVORY J. The defendants in the execution of their duty as a gas company were engaged in the repair of a gas pipe in a highway, and had made an excavation in the highway, as they were entitled to do. I will assume that it was necessary for the purpose of doing the repairs to the pipe that the defendants' workmen should have a fire and some molten lead on or adjacent to the highway. The fire was in a pail and the molten lead was in a ladle resting on the fire. The pail had been placed in the open forecourt of a house which was close to the paved portion of the footway. It is not clear whether the spot where the fire was was actually part of the highway, but if it was not part of it it was adjacent to it and the public had access to it. A boy lawfully using the highway and passing this spot accidentally knocked against the fire pail and upset it, and the molten lead was spilled on the plaintiff, a young child, who was standing close to the fire. This action was brought to recover damages for the injuries sustained by the plaintiff. The county court judge found that the defendants were guilty of negligence in leaving the fire unattended and unguarded with the knowledge that it was surrounded by young children and that it was being used for molten lead. The only question for us to consider is whether there was any evidence on which the county court judge could come to that conclusion.

The plaintiff's claim was framed in the alternative, either for negligence or a nuisance. In my opinion there was evidence on both heads of the claim on which the county court judge might properly find a verdict for the plaintiff. If I had tried the case myself I should have preferred to base my decision on the second ground, namely, that what the defendants were doing was a nuisance in the sense that they were doing something on or adjacent to the

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highway of a character which was dangerous unless steps were taken to guard persons using the highway from the danger. It is clear on the authorities that a person doing something on the highway or on land adjacent to it, which he may lawfully do if he takes proper precautions to guard the public from injury, is guilty in law of a nuisance if he fails to take proper precautions.

Mr. Morton Smith, for the defendants, relied on *Latham* v. *Johnson* (1) as showing that *Cooke* v. *Midland Great Western Railway of Ireland* (2) is not an authority binding on us in this case; but *Latham* v. *Johnson* (1) does not help the defendants, for the judges in that case took care to point out that that was a case of a licensee on private property; it was not a case of injury to a person on land adjacent to a highway. Farwell L.J. in his judgment dealt with the law as to the liability of landowners towards mere licensees and enumerated the exceptions to the freedom from liability, and after referring to *Cooke's Case* (2) he said (3): "There is cast on persons who put in a place, open to their licensees, a thing dangerous in itself, a duty to take precautions for the protection of others who will certainly come into its proximity." It is quite clear, therefore, that the decision in *Latham* v. *Johnson* (1) only applies to a licensee on the defendant's land, and not to a case of a person lawfully on a highway or on land adjacent to it. This is also made clear from a passage in the judgment of Hamilton L.J. (4), where he said: "It is necessary to distinguish all these cases which turn upon negligence from those which turn on nuisance upon or adjoining a highway."

It is only necessary to consider one further point which was relied on, though in my opinion it does not help the defendants, but rather the contrary. Reference was made to *Lynch* v. *Nurdin* (5) and other cases of that class where the proximate cause of the injury was the result of the intervention of another child, but if a dangerous thing is placed on or near a highway and a passer-by accidentally knocks against it, thereby causing injury to another, the person who placed the thing there is the effective cause of the injury

(1) [1913] 1 K. B. 398.
(2) [1909] A. C. 229.
(3) [1913] 1 K. B. at p. 408.
(4) [1913] 1 K. B. at p. 412.
(5) (1841) 1 Q. B. 29.

if he ought to have foreseen that the result of placing it there would be to endanger persons lawfully using the highway.

In my opinion there was evidence in this case on which the county court judge was entitled to find for the plaintiff either on the ground of negligence or nuisance, the fire not having been properly guarded .

LUSH J. Mr. Morton Smith has raised three points: first, that the defendants were under no duty to the plaintiff except not to create a hidden trap; secondly, if there was a duty on the defendants to take reasonable care, apart from the duty not to create a trap, there was no evidence of any breach of that duty; thirdly, if there was a duty and a breach of it, the real cause of the injury to the plaintiff was the intervention of a third party, and there was no connection between the defendants' breach of duty and the injury.

As to the first point, the question of a trap has nothing to do with a wrongful act committed on a highway or on land adjacent to it. The necessity of considering the question of a trap only arises where the person who is said to have created it gave a licence or invitation to others to enter the premises where the alleged trap existed. With regard to a highway the obligation is not to create a nuisance on it, and adjacent land is for this purpose on the same footing as the highway itself: see *Barnes* v. *Ward* (1); *Hounsell* v. *Smyth*. (2) The defendants put a thing which was dangerous in itself on the highway or on land adjacent to it. I think that the place where the fire was placed probably was part of the highway and that that was the justification for placing it there, but it is immaterial. The defendants had no express authority to place the dangerous thing at that spot. They had authority to do anything that was reasonably necessary for the purpose of repairing the gas pipes in the highway, but if they could do it without causing a nuisance, as they clearly could have done by means of a guard or fencing, it is impossible to say that they were entitled to do it in such a way as to create a nuisance. Therefore the defendants not only owed a duty to the plaintiff, but there was a breach of that duty unless the intervening act of the boy in knocking over the fire pail is a reason for saying that the plaintiff's injuries were not the result of the defendants' breach of duty. The intervention of a third

(1) (1850) 9 C. B. 392. (2) (1860) 29 L. J. (C.P.) 203.

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party may break a link in the chain which connects the wrong and the injury resulting from the wrong if the intervention is the real cause of the injury, that is, if the original wrong-doer had no reason to contemplate the possibility of the intervention. But in the present case there is no ground for that contention, for both the plaintiff and the boy were lawfully using the highway, and the accident was the direct and natural consequence of such user, and the case comes within the principle stated by Hamilton L.J. in *Latham* v. *Johnson* (1), where he said: "No doubt each intervener is a causa sine qua non, but unless the intervention is a fresh, independent cause, the person guilty of the original negligence will still be the effective cause, if he ought reasonably to have anticipated such interventions and to have foreseen that if they occurred the result would be that his negligence would lead to mischief."

I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *T. G. Baynes, Dartford.*
Solicitors for defendants: *Blyth, Dutton, Hartley & Blyth.*

(1) [1913] 1 K. B. at p. 413.

F. O. R.

[IN THE COURT OF APPEAL.]

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March 23, 24, 25.

BANK OF AUSTRALASIA AND OTHERS *v.* CLAN LINE STEAMERS, LIMITED.

Shipping—Bill of Lading—Contract of Liability for Unseaworthiness—Unseaworthy Ship—Limitation of Time for Claims—Applicability of Limitation in Case of Unseaworthiness—Transhipment of Goods.

In an action by indorsees of bills of lading against shipowners for breach of contract and for damages for injury to the goods carried it appeared that the goods were shipped at Wellington, New Zealand, upon the *Clan Maclaren*. At Port Pirie it was discovered that a portion of the goods (wool) was damaged by sea water, and the damaged portion was there transhipped into the *Geelong*. The *Clan Maclaren* arrived in London on April 13 and the *Geelong* on April 23, and on arrival the wool in both ships was found to be damaged by sea water owing to the unseaworthiness of the *Clan Maclaren*. Clause 3 of the bill of lading made provision for transhipment of the goods. Clause 12 provided that "No claim that may arise in respect of goods shipped by this steamer will be recoverable unless made at the port of delivery within seven days from the date of steamer's arrival there." Clause 14 provided that "The shipowners shall be responsible for loss or damage arising from any unseaworthiness of the vessel when she sails on the voyage." No claim was made by the plaintiffs upon the defendants till June 10, more than seven days after the arrival of either vessel. Bailhache J. held that, as the *Clan Maclaren* was unseaworthy, the provisions of clause 12, which limited the time for making claims, did not apply:—

Held, that, in view of the fact that the bill of lading was subject to an express condition making the shipowners liable for damage resulting from unseaworthiness, the provisions of clause 12 applied.

Held, further, by Pickford and Bankes L.JJ. (Buckley L.J. doubting), that the clause, not being clear and unambiguous, afforded no protection to the shipowners in respect of the goods transhipped to the *Geelong*.

APPEAL of the defendants from a judgment of Bailhache J.

The action was brought to recover damages for breach of contract in the carriage of the plaintiffs' wool on board the defendants' steamship and damages for injury to the goods owing to the unseaworthiness of the ship. The bills of lading given by the master in respect of the goods specified that they were "shipped in good order and condition on board the steamship *Clan Maclaren* . . . .

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now lying at Wellington," and the bill of lading contained several clauses or conditions, of which the following are material :—

Clause 3 : " The owners are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers, ship or ships, either belonging to themselves or to other persons, proceeding by any route, and whether directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination, and to tranship or land and store the goods either on shore or afloat, and re-ship and forward the same at the owners' expense but at merchant's risk."

Clause 12 : " No claim that may arise in respect of goods shipped by this steamer will be recoverable unless made at the port of delivery within seven days from the date of steamer's arrival there."

Clause 14 : " The shipowners shall be responsible for loss or damage arising from any unfit state of the vessel to receive the goods, or any unseaworthiness of the vessel when she sails on the voyage. But any latent defect in hull, machinery, equipment or fittings shall not be considered unfitness or unseaworthiness ; provided the same do not result from want of due diligence of the shipowner or of the ship's husband or manager."

The plaintiffs' goods were loaded on board the *Clan Maclaren* at Wellington, and the steamer sailed for Port Pirie, where it was found that a portion of the goods had been damaged by sea water which had got into the hold owing to defects in the plates of the tanks. The damaged portion was transhipped and loaded on board the *Geelong*, a steamer belonging to another line. The *Clan Maclaren* and the *Geelong* sailed with the wool on board for London, where the *Clan Maclaren* arrived on April 13, 1912, and the *Geelong* on April 23. On arrival the goods were found to be in each case damaged by sea water owing, it was alleged, to the unseaworthiness of the steamer. No claim was made by the plaintiffs in respect of the damage until June 10. Shortly afterwards this action was brought for breach of contract in the carriage of the wool and for damages for injury to it.

Bailhache J., after stating the facts and holding that the defects in the steamer were not latent defects and that the *Clan Maclaren* was by reason of such defects unseaworthy when she left Wellington, proceeded as follows : " Mr. Wallace's main point on behalf of the

defendants was that as clause 12 of the bill of lading provides that 'no claim that may arise in respect of goods shipped by this steamer will be recoverable unless made at the port of delivery within seven days from the date of steamer's arrival there,' and that as no claim was made in respect of the damage until after the expiration of seven days from the date of the arrival of the steamers, no claim can now be sustained by reason of clause 12 of the bill of lading. As a matter of construction upon this clause I am inclined to take the view that 'the date of steamer's arrival there' is the date of the arrival of the *Clan Maclaren*, and I think that the steamer whose arrival is referred to in clause 12 must be taken to be the same steamer as is referred to in the earlier part of the clause as being the steamer on which the goods were shipped. If I were inclined to extend that clause at all, I should extend it by the operation of clause 3 of the bill of lading. Clause 3 gives liberty to the shipowner in certain cases to tranship the goods and carry them by another steamer, and I should be disposed to hold that clause 12 covers the ship on which the goods were originally shipped and any other ship on to which they were transhipped under and by virtue of clause 3. In this case clause 3 was not called into operation at all; the goods were landed at Port Pirie and were transhipped into the *Geelong*, not by virtue of any powers given under clause 3, but by virtue of the general law which makes the master of a ship under these circumstances the agent of the owner of the goods to do what is best for the goods. I do not think this clause can be stretched to cover the goods which arrived by the *Geelong*.

"There is a further difficulty in applying this clause in this case, because under some of these bills of lading some of the goods which are the subject of one bill of lading arrived by the *Clan Maclaren* and some by the *Geelong*, and it would be impossible in the case of those goods to have framed a claim within seven days of the arrival of the *Clan Maclaren* for the simple reason that the *Geelong* did not arrive until ten days afterwards. I think there would be great difficulty in applying the clause to those goods. The clause would still, I think, apply to those goods contained in one bill of lading, the whole of which came by the *Clan Maclaren*.

"But there is this further objection, that the damage to these goods was caused by unseaworthiness, and it is suggested that

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clause 12, although effective enough in the case of damage by negligence, or damage from any cause other than unseaworthiness, has no operation where the damage is caused by unseaworthiness. In my opinion that contention is right. The law, as I understand it, is that when goods are damaged by unseaworthiness, unless there is an exception of unseaworthiness in the charterparty or the bill of lading, the shipowner will be liable; the ordinary exceptions and the ordinary conditions and other clauses in the bill of lading do not apply for the reason that it is assumed that the contract between the shipowner and the shipper of the goods or the charterer, as the case may be, is a contract proceeding on the basis that the charterer says to the shipowner 'If you will supply me with a seaworthy ship I will contract with you on the terms of your bill of lading'; and the bill of lading contract is dependent upon the provision by the shipowner of a seaworthy ship. The reason is not quite satisfactory, although I think the law is clear; but fortunately our law does not pretend to be logical, and when to be strictly logical would lead to absurd results our law prefers common sense to logic, and I think it is because our law prefers common sense to logic that the law is as I have stated. If it were not so, the alternative would be that unseaworthiness would eliminate the whole of the clauses in a bill of lading or in a charterparty, whether or not the unseaworthiness had anything to do with the damage, and that would lead to such startling results that the law shrinks from it. That, for instance, would eliminate all the exceptions in the bill of lading in a damage to cargo case if it should turn out on the arrival of the ship that she had not started from her port of departure with a sufficient medicine chest on board, a matter which would have nothing to do with the damage to the goods, and yet, if the reasons for the unseaworthiness depriving the owner of the benefit of his exceptions were applied with strict logic, it would deprive him in a case like this. I need not trouble to cite authorities. One of the most illuminating is *The Europa* (1); another is *Kish* v. *Taylor, Sons & Co.* (2) The result is that so far as the damage can be traced to unseaworthiness clause 12 of the bill of lading is no excuse, and the defendants are liable for so much of the damage to the bales of wool as can be attributed to unseaworthiness, that is to say, to the direct

(1) [1908] P. 84. (2) [1912] A. C. 604.

and indirect effects of the incursion of sea water. My judgment must therefore be for the plaintiffs."

The defendants appealed.

George Wallace, K.C. (*Stuart Bevan* with him), for the defendants. The condition in clause 12 of the bill of lading that claims for damage to the wool must be made within seven days from the date of ship's arrival at port of delivery is an answer to the plaintiffs' claim in respect of damage due to unseaworthiness; in other words, clause 12 applies to damage caused by unseaworthiness just as it applies to damage caused in any other way. The seaworthiness of the ship was not a condition precedent, though it would have been a condition precedent to the right of the shipowners to require the shippers to put their goods on board. The plaintiffs are claiming as indorsees, and are therefore entitled only to the benefit of the bill of lading contract. The implied warranty of seaworthiness is replaced by the express terms of the bill of lading, and the contract as to seaworthiness is provided for by clause 14. *Tattersall* v. *National Steamship Co.* (1) is distinguishable, for in that case the contract contained no express stipulation as to seaworthiness. In *Morris* v. *Oceanic Steamship Co.* (2) the contract provided for the liability of the shipowners for unseaworthiness, and that decision is in point and governs the present case. [He also cited *Leduc* v. *Ward* (3); *Kish* v. *Taylor, Sons & Co.* (4); *The Europa* (5); *Wiener & Co.* v. *Wilson and Furness-Leyland Line* (6); *The Maori King* v. *Hughes* (7); *Nelson Line* (*Liverpool*) v. *James Nelson & Sons* (No. 2). (8)

A second point arises out of the transhipment of a portion of the wool to the *Geelong*. As to this Bailhache J. has held that clause 12 does not apply to the wool which arrived by the *Geelong;* but it is submitted that clause 3 is sufficiently wide to cover this transhipment and to put the wool which arrived by the *Geelong* in the same position as that which arrived by the *Clan Maclaren*. Clause 3 entitles the shipowner to tranship, it is an express clause, and should be read with clause 12.

(1) (1884) 12 Q. B. D. 297.
(2) (1900) 16 Times L. R. 533.
(3) (1888) 20 Q. B. D. 475.
(4) [1912] A. C. 604.
(5) [1908] P. 84.
(6) (1910) 15 Com. Cas. 294.
(7) [1895] 2 Q. B. 550.
(8) [1908] A. C. 16.

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Adair Roche, K.C., and *Mackinnon, K.C.*, for the plaintiffs. First, as to the second point, which is of great importance in the present case. Clause 12 is not plain, but is ambiguous, and should therefore be construed against the shipowners, who are not protected by it: *Nelson Line* (*Liverpool*) v. *James Nelson & Sons.* (1)

As to the first point, there are here two contracts, one as to the seaworthiness of the ship, and the other as to carriage of the wool. In the absence of clear language the clause of limitation applies only to the contract of carriage. The law is put compendiously by Channell J. in *Bond, Connolly & Co.* v. *Federal Steam Navigation Co.* (2), where he says at p. 440: "As regards the terms of the bill of lading, the cases show that one ought to approach the exceptions in a bill of lading as exceptions to the liability of a carrier and not as exceptions to the liability of a warrantor." If shipowners wish to cut down their obligations they must do so in plain terms; here the clause is not clear and should therefore be read as applying only to the contract of carriage. The clause has no effect upon the implied obligation of seaworthiness. It may be said that the decision in *Morris* v. *Oceanic Steamship Co.* (3) is an authority against the plaintiffs' contention, but it must be remembered that in that case the decision in *Tattersall* v. *National Steam Navigation Co.* (4) was not brought to the notice of the Court. In any event *Morris* v. *Oceanic Steamship Co.* (3) is distinguishable from the other decisions by reason of the special clause in the contract. [They also cited *Baxter's Leather Co.* v. *Royal Mail Steam Packet Co.* (5)]

George Wallace, K.C., in reply, cited *Moore* v. *Harris.* (6)

BUCKLEY L.J. In this action the indorsees of bills of lading sue the shipowner for breach of contract, and for damages for injury to the goods carried by the ship. There are three clauses of the bill of lading which are of importance. The first is clause 3, which provides for possible transhipment of the goods; the second is clause 12, which contains a limitation of time within which claims must be made in respect of goods shipped; and clause 14 is a clause which provides contractually for liability for unseaworthiness. The points

(1) [1908] A. C. 16.
(2) (1905) 21 Times L. R. 438.
(3) 16 Times L. R. 533.
(4) 12 Q. B. D. 297.
(5) [1908] 2 K. B. 626.
(6) (1876) 1 App. Cas. 318.

for decision really are two: first, whether, if unseaworthiness is a matter which arises here, the clause of limitation of time for claim applies; and, secondly, if it does apply, what is the true meaning of the clause as to limitation of time.

The goods were shipped at Wellington upon a ship called the *Clan Maclaren*. She sailed to Port Pirie. At Port Pirie she transhipped some of the goods into a ship called the *Geelong*. The *Clan Maclaren* arrived on April 13, 1912, with so much of the goods as remained on board that vessel. The *Geelong* arrived on April 23 with the rest of the goods. The goods were damaged by unseaworthiness of the vessel. Certain tanks were corroded, and water escaped and the goods were damaged. There was a question raised at the trial as to latent defect. There was not a latent defect; it was well known to the shipowner. There is no question but that the shipowner is liable but for the points which now arise before us for decision.

The first question to be determined is that arising upon clause 14, as to what is the liability of the shipowner for unseaworthiness. It is well settled that where goods are shipped on board ship there is an implied obligation on the part of the shipowner that he will provide a ship proper for the voyage. If there be no provision in the express contract at all with relation to it, there is nevertheless that implied contract. It is another matter whether, if there be an express contract in the bill of lading, the implied contract survives. That is the question which arises here. But there may exist, and generally do exist, two contracts, the one arising by implication as a matter of law that a seaworthy vessel shall be provided, and the other the express contract as contained in the document.

There are two cases bearing on this matter on which I wish to say something—*Tattersall* v. *National Steamship Co.* (1) and *Morris* v. *Oceanic Steamship Co.* (2) The decision in *Tattersall's Case* (1) was this. The express contract contained a clause limiting liability. The goods shipped were cattle, and the limit of liability was 5*l.* a head. There was no express contract as to unseaworthiness. The implied contract, therefore, applied. What was decided in *Tattersall's Case* (1) was that the contractual limit of liability was

(1) 12 Q. B. D. 297. (2) 16 Times L. R. 533.

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confined to the terms contained in the express contract, the terms as to the carriage of the goods, and that the limitation of liability did not extend to the liability arising under the implied contract as to seaworthiness. That was the whole of the decision in *Tattersall's Case*. (1) I will read a sentence of Day J.'s judgment. The goods "were damaged simply because the defendants' servants neglected their preliminary duty of seeing that the ship was in a proper condition to receive them, and received them into a ship that was not fit to receive them. There is nothing in the bill of lading that I can see to restrict or qualify the liability of the defendants in respect of the breach of this obligation, and, therefore, I think our judgment upon the question submitted to us must be for the plaintiff."

It has been supposed that *Morris* v. *Oceanic Steamship Co.* (2) contains something which is in conflict with *Tattersall's Case*. (1) In *Morris* v. *Oceanic Steamship Co.* (2) the relevant clause was: "The carrier shall not be liable for loss or damage occasioned by any latent defect in hull, machinery or appurtenances or unseaworthiness of the ship, even existing at time of shipment or sailing on the voyage, provided the owners have exercised due diligence to make the vessel seaworthy." So there was there an express contract as to unseaworthiness in an event—provided they had exercised due diligence. They had not exercised due diligence. There was, therefore, a contract as to unseaworthiness in an event which had not happened. It may be said that under those circumstances there was no contract as to unseaworthiness. If the case be regarded from that point of view, then it was the same as *Tattersall's Case* (1), in which there was no contract as to unseaworthiness. In *Morris* v. *Oceanic Steamship Co.* (2) Mathew J. held that the clause of limitation of liability did apply; but of course if the case be regarded from that point of view, then, as Hamilton J. pointed out in *Wiener* v. *Wilson's Line* (3), the two cases are in conflict. There is no question about that. But to my mind that is not the decision. I do not see any conflict, for the reasons I am about to state. It will be remembered that the provision was that the carrier should not be liable for unseaworthiness in an event. There was no obligation that he should exercise due diligence to make the vessel seaworthy; there

(1) 12 Q. B. D. 297. (2) 16 Times L. R. 533.
(3) 15 Com. Cas. 294.

was only a provision that, if he did not do that act, then a consequence should ensue, but there was no contractual liability to make the vessel seaworthy. If he used due diligence, he was relieved from liability for unseaworthiness. There was no obligation on his part to use due diligence. If he did not use it, the clause did not apply, and he was left to other consequences. But Mathew J. did not so read the contract, because what he said was this. As reported in *The Times* Law Reports his language runs thus: "It was not necessary to deal with the present case on the footing of" a case which he mentions, "because here the bill of lading contains an express provision that the shipowner was to use due diligence to make the vessel seaworthy." As I have pointed out, it did not. Then he concludes his judgment thus: "He felt compelled to come to the conclusion that the clause was intended to limit the liability of the defendants in the event of a breach of their duty to use due diligence to make the vessel seaworthy." If the contract was one by which the shipowner was contractually responsible towards the cargo owner to use due diligence to make the ship seaworthy, and he was sued for not performing that obligation, it would be easy enough. It seems to me that is all the learned judge says. In order to see exactly what was the language which he used, the solicitors have been so kind as to get me the shorthand notes of the judgment, and I will read the two passages in the judgment as delivered, which are those reproduced in *The Times* Law Reports. The former of them, that in the left-hand column of *The Times* Law Reports, runs in these words. The learned judge says: "Because there is here what makes the meaning of the parties perfectly clear independently of the Act"—that is, the Harter Act—"express provision that due diligence is to be used in making the vessel seaworthy for the voyage"; so the report seems to be quite right. He found there was an obligation to do it. The later passage at the end of the judgment I will read at length. It is a little longer than in *The Times* Law Reports. Before reading it, I ought to say that what the report calls clause 1 of the contract is found in the statement of facts beginning with the words "It is also mutually agreed that the value," and so on. That is what the judge called clause 1. He says: "Moreover it is to be borne in mind that the latter part of the section"—that

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means this clause 1—"is clearly intended to limit the pecuniary liability of the owners in case of a loss. It was pointed out that any claim against the owners under the terms of the bill of lading was not likely to arise, because they were exonerated from all liability. The answer was, Yes, liability would arise in case due diligence was not used to make the ship seaworthy, and that is the only case that probably would arise, and this clause limits the liability in that case. I am compelled to come to the conclusion that this is the true construction of the clause, and it was to limit the liability in the event of the owners being made liable for a breach of their contract as to due diligence." That is perfectly plain, and the report was quite right. What the learned judge thought—erroneously, I think—was that the contract, the bill of lading, contained an express provision that the shipowner should use due diligence. As I have pointed out, it did not, but of course we must read his decision on the footing of the contract as he read it. He read it as containing a clause imposing the liability to exercise due diligence, and held that consequently they were liable. There is no difficulty at all in the case. It does not conflict with *Tattersall's Case* (1); it seems to me to have nothing to do with it.

Those being the only authorities I need mention, I now go to clause 14. It seems to me that clause 14 is this. It is an express contract covering the ground which would be the subject of the implied contract if there were no express contract. The relevant words are these: "The shipowners shall be responsible for loss or damage arising . . . . from any unseaworthiness of the vessel when she sails on the voyage." As regards implied contract, the way in which the law proceeds is this. There are some contracts entered into under some circumstances in which the law says "This is not the whole contract, because the relations between the contracting parties are such that the law will imply something which is not here expressed." Familiar instances are where there is a contract in a trade in which there is a custom of the trade, or where some obligation arises in a matter in which there is a custom of a manor. If the express contract does not contain that which, if there was nothing said about it in the contract, the law would imply, then the implied contract takes effect; but if the express

(1) 12 Q. B. D. 297.

contract deals expressly with that which, in the absence of that which is expressed, would be implied, then the whole thing rests upon the expressed contract, and there is no need to imply anything, because it is already there. It seems to me that in this case clause 14 has expressly introduced that which would otherwise be implied, and that therefore the obligation as regards seaworthiness in this case rests upon express contract and not upon implied contract. The relevance of that for the present purpose is this. The clause of limit of liability, according to *Tattersall's Case* (1), would not extend to the implied contract if it were implied; but if it is expressed, then such stipulation of the contract is to be applied to that part of the contract as well as to any other part. The result is that *Tattersall's Case* (1) does not apply in this case. There is here an express contract as to unseaworthiness. Consequently clause 12 applies.

It remains to see what clause 12 means, and here there is a matter of very considerable difficulty. It will be remembered that under clause 3 the goods could be transhipped, and they were transhipped, and the one vessel arrived on the 13th and the other on the 23rd of April. Bearing these facts in mind, clause 12 runs thus: "No claim that may arise in respect of goods shipped by this steamer"—that means the *Clan Maclaren* obviously—"will be recoverable unless made at the port of delivery within seven days from the date of steamer's arrival there." As I said, the *Clan Maclaren* arrived on April 13, and the *Geelong* on April 23. No claim was made till June 10, more than seven days after either arrival. Now the reading of this clause seems to me to mean this. The goods which are the subject-matter of the clause are defined as goods shipped by this steamer or goods shipped on the *Clan Maclaren*. That is the operation of those words; and as regards that class of goods this bargain is made, that no claim that may arise in respect of them will be recoverable unless made at the port of delivery within seven days from the date of steamer's arrival there. I myself should read that clause as meaning unless made at the port of delivery within seven days from the date of the arrival of the steamer making the delivery, and, if so, of course that would be as regards the latter goods the *Geelong*, and not the *Clan Maclaren*. On the other side it is said

(1) 12 Q. B. D. 297.

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"this steamer" is mentioned in the earlier part of the clause, plainly meaning the *Clan Maclaren*, and "steamer's arrival there" must mean the same steamer. So that it must be read "the date of the *Clan Maclaren's* arrival there." I myself do not take that view. It is a trifling thing, but it is a fact that the words are not "the steamer," or "this steamer," or "the said steamer," but "steamer's arrival." The conclusion at which I have arrived is based upon the fact that the contract is one which contemplates, amongst other things, transhipment, and I should expect that the contracting parties would wish to work out this kind of clause as regards all events which might arise under the contract, including that of transhipment; therefore I should expect the clause to provide for the case of transhipped goods as well as of other goods, and I can so read the clause, by reading it in the way I have suggested—"unless made at port of delivery within seven days of the delivering steamer's arrival there." On the other hand it may be said that the shipowner is bound to say exactly what he means. He is going to relieve himself from liability and he must do it by plain words. I think the words mean what I suggest, but if they do not, if they are ambiguous, no doubt the contract ought to be construed against the shipowner, and consequently it must be taken he is not so relieved. That is the view taken by the other members of the Court. I myself have arrived at a different conclusion. The result is this. The goods which arrived by the *Geelong* ought, upon that construction of the clause, to have been the subject of a claim within seven days after the arrival of the *Clan Maclaren*. That would have been April 20, which would be three days before the *Geelong* arrived. That clause will not fit that case. Therefore it is said that case is not within the clause at all, and consequently the shipowner is not relieved. That is a matter which weighed upon me in arriving at the other construction of the clause, but that is the result. If the clause is to be so construed, then the shipowner has not introduced relevant words for the purpose of protecting himself as regards the goods which arrived by the *Geelong*, because, in reason, he could not claim them until after they had arrived and had seen that they were damaged, and, inasmuch as the seven days expired on April 20 and they did not arrive until the 23rd, he never could make a claim.

That being so, the cargo owner's claim succeeds as regards the *Geelong* and fails as regards the *Clan Maclaren*. I myself should have allowed the appeal simpliciter, but if the clause be construed in that way, the order must be to discriminate between the two classes of goods.

PICKFORD L.J. I agree as to the first point, and I should not add anything at all but for the fact that we are differing from the learned judge in the Court below, who is a judge of very great experience in these matters. To my mind what you have to do in every one of these cases is to look at what the contract before you means, what the bill of lading upon which the action is brought means. There is nothing in law to prevent a shipowner from putting an exception into his bill of lading which will relieve him from all the consequences of unseaworthiness wherever and whenever it exists. The only question in each case is whether he has done it or not; you have to look at the particular document before you, and the cases which have been decided are only of assistance so far as they lay down principles, if they do lay down principles, which ought to be applied to the construction of the document. Now the two cases which are always cited on the one side and on the other in these matters are the cases of *Tattersall* v. *National Steamship Co.* (1) and *Morris* v. *Oceanic Steamship Co.* (2) They do not, either of them, seem to me to help very much in the construction of this document. I agree that really what the decision in *Tattersall* v. *National Steamship Co.* (1) comes to is this: that upon that contract, which the Court had before it in that case, the exceptions in the bill of lading only applied to the contract of carriage, to the carriage of goods, and therefore they did not affect the obligation to provide a seaworthy ship, which was different from and antecedent to the obligations of the contract of carriage. The case of *Morris* v. *Oceanic Steamship Co.* (2) certainly presents difficulties when you take the facts of the contract with the construction which the learned judge seemed to put upon them. There were no express words there which imposed liability for unseaworthiness, and all that there was in the bill of lading or the charter (I forget which it was) which related to unseaworthiness was an exception from liability in respect

(1) 12 Q. B. D. 297. (2) 16 Times L. R. 533.

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of unseaworthiness provided due care had been taken to avoid it. That was an exception and nothing more, and when it was shown that due care had not been taken, and therefore the condition upon which the exception rested was not fulfilled, I should have thought that the result was what was expressed in the words of Fletcher Moulton L.J. in the case of *James Nelson & Sons* v. *Nelson Line* (1): "The jury have found"—in the case of *Morris* v. *Oceanic Steamship Co.* (2) it was not a jury, but a judge—"that in this case all reasonable means to that end had not been taken. The exception therefore disappears, and the obligation of initial seaworthiness remains." And again: "Here the jury have found that the condition was not in fact satisfied, and the case is therefore reduced to one which is subject to the ordinary obligation to supply a seaworthy ship." I should certainly have thought that that was the true view to take of the position of things in *Morris* v. *Oceanic Steamship Co.* (2) But it seems to me quite clear that the learned judge who decided it did not take that view. He took the view that there was in that contract an express provision that the shipowners should exercise due diligence to avoid unseaworthiness. I cannot see anything of the kind. There was a provision that they should not escape liability for unseaworthiness unless they exercised due diligence, but I cannot see that that made a contract that they should exercise due diligence. They might not do so. Then they would remain liable. However, the learned judge so construed it, and so construing it he came to the conclusion that the exception, which was one of value in that case, applied to that express contract which he thought to exist in the bill of lading. That was the explanation of it given by Hamilton J. in the case which has already been referred to of *Wiener* v. *Wilson and Furness-Leyland Line.* (3) Now, as I say, I do not think either of those two cases really helps materially to construe the contract before us. The contract begins with the usual obligation, of course: "To be delivered subject to all the above liberties to deviate and to the exceptions and conditions at foot hereof in like good order and condition." Then there were a number of other things chiefly providing what the ship would not be liable for, and then we come to clause 14: "The shipowners

(1) [1907] 1 K. B. 769, at p. 781. (2) 16 Times L. R. 533.
(3) 15 Com. Cas. 294.

shall be responsible for loss or damage arising from any unfit state of the vessel to receive the goods, or any unseaworthiness of the vessel when she sails on the voyage. But any latent defect in hull, machinery, equipment or fittings shall not be considered unfitness or unseaworthiness, provided the same do not result from want of due diligence of the shipowner or ship's husband or manager." The first part of that clause does not seem to me to do more than express in terms what would be the obligation if it were not there, and it may be said, and it has been said with some force, that that cannot make any difference. If you write in what otherwise must be taken as impliedly written in, it is exactly the same as if you had not written it in at all. There is great force in that argument, but I do not think it is really sound, because I think the effect of writing it in, instead of leaving it to be implied, is that it makes it an express term of the bill of lading, which was not so in either of the cases to which I have referred; and, making it an express term of the bill of lading, it is more likely that the meaning of the bill of lading exception is that it shall apply to the term which is expressly put into the bill of lading. The clause is, as I have read, "The shipowners shall be responsible for loss or damage arising from any unfit state of the vessel to receive the goods, or any unseaworthiness of the vessel when she sails on the voyage." That seems to me to mean responsible in every way, and amongst other ways responsible in damages, or, to put it in another phrase, responsible to satisfy any claims which may arise in consequence of unseaworthiness or unfitness. Then, going to clause 12, we find that "no claim that may arise in respect of goods shipped by this steamer will be recoverable unless made at the port of delivery within seven days from the date of steamer's arrival there." Looking at the express terms of clause 14, and looking at the whole of the bill of lading, it seems to me that you must read it as including in the operation of that exception the express provision that the shipowner shall be responsible, which is contained in clause 14. The action is upon the condition in clause 14. The action is upon the bill of lading. It is a claim upon the bill of lading, and it is a claim upon the bill of lading in respect of that very expressed condition. Therefore it seems to me that, looking at the whole, you must read clause 12 as operating upon a claim in respect of unseaworthiness. I prefer to put it that,

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looking at the bill of lading, you must so read it, rather than to say, as it is sometimes put, "It must have been in the contemplation of the parties," because that seems to presuppose a meeting of the parties and an agreement of the terms of this particular bill of lading, which we know does not take place. There is a document which is signed by the master and accepted by the holder of the bill of lading, but they neither of them in fact look at and discuss the terms of the bill of lading. Therefore when you say it is in the contemplation of the parties it simply means that, looking at the whole of the bill of lading, that is what it means. For these reasons I think clause 12 does apply. Now the question is, what does clause 12 mean? And on this I confess I have very great doubt. I have very great doubt because I think the condition is by no means clear. It says this: "No claim that may arise in respect of goods shipped by this steamer will be recoverable unless made at the port of delivery within seven days from the date of steamer's arrival there." Now, reading that, I think if one asked anybody who was not construing the bill of lading "Does 'steamer' in the second part mean the same as 'steamer' in the first part," they undoubtedly would say "Yes, it does." "No claim that may arise in respect of goods shipped by this steamer shall be recoverable unless made within seven days of the date of steamer's arrival there," and in order to read it otherwise it seems to me you must read some other words in. If you read it, as Buckley L.J. says would be the inclination of his mind to read it, you have in effect, I think, to read in "In respect of the date of this steamer or of any other steamer which may be substituted for it under clause 3," or "this steamer or any other steamer which may be carrying the goods." If you have to read it, as I think is really the right way to read it, you have to put in these words: "No claim that may arise in respect of goods shipped and delivered by this steamer will be recoverable unless made within seven days of the date of the steamer's arrival." If you have to read in any words at all, as this is a document put forward by the shipowner, I think you must read in the words which are against the shipowner, and therefore I think that the second set of words which I put should be read in. But I think it may also be put on another ground, and that is that if the shipowner is to protect himself he must do so by words that are perfectly clear, and it seems to me that

these words are not clear. They are not clear to show that they mean that, if you tranship the goods under clause 3, the protection is to be in respect of the arrival of each ship into which they are transhipped. We have the authority of the House of Lords in the case of *Nelson Line* v. *Nelson & Sons* (1) that if a shipowner puts in a clause which he intends for his protection, and which is ambiguous and not clear, then it does not operate to protect him.

I think on either of these grounds that that is the proper construction of clause 12. Therefore I think the result is that the goods owners are entitled to claim for the goods which were carried by the *Geelong*, but are not entitled to claim in respect of the goods that were carried by the *Clan Maclaren*.

BANKES L.J. Every contract for the carriage of goods by sea is, unless it is expressly excluded, subject to the implied condition as to the seaworthiness of the vessel. The bill of lading may be silent as to this implied condition or it may refer to it. In cases where it is silent the contract between the shipowners and the holder of the bill of lading consists partly of the implied contract and partly of the express contract.

It is quite true that the implied contract is just as binding as the express contract, and that the written contract must be read as though the implied contract was written into it. The implied contract is, however, free from conditions; consequently if it is written into the express contract it must be written in in such a way as to make it plain that the conditions contained in the express contract do not apply to it. Unless this is done, the contract which is written in is not the implied contract, but something different.

This, I think, is an explanation of the decisions which hold that, where the bill of lading is silent as to the condition of seaworthiness, the conditions in the bill of lading are not to be applied to the implied contract. The same train of reasoning is applicable in the case where a provision is made in the bill of lading co-extensive, or practically co-extensive, with the implied contract. In such a case the rule of construction that the express contract excludes any implied contract would apply; but upon the assumption that any implied contract still exists and is written into the express contract

(1) [1908] A. C. 16.

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a condition in this case is found in the written contract in terms referring to the subject-matter of the implied contract and controlling it. In the present case the bill of lading contains an express contract as to seaworthiness. It is for breach of this contract that this action is brought, and in my opinion condition 12 applies. I agree with what Buckley L.J. has said about the decisions in *Tattersall* v. *National Steamship Co.* (1) and *Morris* v. *Oceanic Steamship Co.* (2), and to understand the latter decision it is necessary to bear in mind always that Mathew J. held that the bill of lading contained an express contract as to seaworthiness.

Upon the question of the construction of clause 12 I am not prepared to read any words into the contract to enable the shipowner to limit his liability in the event which happened. Mr. Wallace wishes to read into the clause between the word "steamer's" and the word "arrival" some such words as "or other the steamers substituted for the said steamer under clause 3." I read the word "steamer" at the end of the clause as referring to the steamer mentioned in the earlier part of the clause. If so, it would be an absurd construction to read the clause so as to apply it to any other than the original steamer, and in my opinion it must therefore be confined to that steamer and to that steamer only. Under these circumstances the clause does not apply to the goods delivered from the *Geelong* and is no answer to the claim in respect of those goods, and I agree with the proposed order to be made.

BUCKLEY L.J. The result will be that the judgment will be altered and will run thus: Judgment to be entered for the plaintiffs on the question of liability as regards the goods which arrived by the *Geelong*, but not as regards the goods which arrived by the *Clan Maclaren*. The plaintiffs will have their costs in the Court below, and the appellants will have the costs of this appeal, to be set off.

Appeal allowed in part.

Solicitors for appellants: *Coward & Hawksley, Sons & Chance.*
Solicitors for respondents: *W. A. Crump & Son.*

(1) 12 Q. B. D. 297. (2) 16 Times L..R. 533.

W. J. B.

[IN THE COURT OF APPEAL.]

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Oct. 14, 15, 29.

JEFFERSON *v.* PASKELL.

[1913 J. 164.]

Marriage—Breach of Promise—Illness of Plaintiff at Date fixed for Marriage—Defence of Illness—Onus of proving that she was fit to marry within a reasonable Time afterwards—Reasonable Ground for believing Plaintiff to be unfit.

Where the plaintiff in an action for breach of promise of marriage was admittedly in such a state of health on the date fixed for the wedding as to be unfit to marry, and was therefore not ready at that date to marry the defendant, the onus lies upon the plaintiff of proving that she was ready, that is to say, fit, to marry the defendant within a reasonable time thereafter; but slight evidence is sufficient to discharge this onus.

The fact that the defendant honestly and on reasonable grounds believed that the plaintiff was unfit for marriage is no defence to an action for breach of promise of marriage, if the plaintiff was not in fact unfit.

The question whether and in what circumstances illness is a valid excuse for refusal to marry discussed.

Observations on *Hall* v. *Wright* (1859) E. B. & E. 746, 765, by Phillimore L.J.

Application for judgment or a new trial in an action tried before Bray J. and a special jury.

The action was brought by the plaintiff, Miss Lillian Ida Jefferson, against the defendant, Ernest C. Paskell, to recover damages for breach of promise of marriage.

The statement of claim was as follows :—

"1. On the 31st of July, 1912, the defendant verbally promised to marry the plaintiff within a reasonable time.

"2. On or about the 7th day of March, 1913, the defendant verbally promised to marry the plaintiff on the 28th of March, 1913, or alternatively within a reasonable time thereafter, and on the 14th day of March, 1913, the plaintiff verbally consented that the date of the said marriage should be postponed until the 2nd of April, 1913, and on or about the 18th of March, 1913, the plaintiff verbally consented that the date of the said marriage should be postponed until the 9th of April, 1913.

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"3. In breach of his said promise the defendant refused and neglected to marry the plaintiff on the 28th of March, 1913, or within a reasonable time thereafter, and by letter dated the 12th September, 1913, written by his solicitors and agents has wholly refused to marry the plaintiff."

The defence (so far as material) was as follows :—

"1. The defendant denies that on the 31st July, 1912, he promised to marry the plaintiff. The defendant promised on the 9th November, 1912, to marry the plaintiff and not previously.

"3. Before the date fixed for the said intended marriage as above mentioned" (April 9, 1913), "namely, on or about the 27th March, 1913, the defendant for the first time discovered, as the fact was, that during the month of March, 1913 (the defendant cannot give the exact date), the plaintiff had contracted the disease of tuberculosis. At the said date the plaintiff was so ill from the said disease that she was not able to be married, and was about the said date verbally advised by her medical advisers that she could not marry. . . . . The plaintiff continued to suffer from the said disease from the 27th March, 1913 (or thereabouts), until the commencement of this action.

"4. By reason of the facts mentioned in paragraph 3 hereof the defendant became entitled to and did by letter from his solicitor to the plaintiff's father on her behalf, dated the 14th April, 1913, validly rescind the said contract of marriage, and thereafter ceased to be bound to marry the plaintiff.

"5. Further or alternatively by reason of the facts mentioned in paragraph 3 hereof the plaintiff was never ready and willing to marry the defendant."

At the trial the defendant obtained leave to raise by way of amendment a further defence that he honestly and on reasonable grounds believed the plaintiff to be in such a condition as to be unfit for marriage.

The following statement of the facts is taken from the judgment of Swinfen Eady L.J. :—

"The plaintiff was twenty-two years of age on September 17, 1912, and is the daughter of the late Robert Louis Jefferson, who was engaged in the motor trade. The defendant was then thirty-nine years of age, and is engaged in the cycle trade. There is no

dispute about the promise to marry, although the parties are not entirely agreed as to when it was made, but at all events by November, 1912, there was a mutual engagement to marry.

"In March, 1913, a house had been taken as a home for the parties when married, the marriage licence had been obtained, the wedding-ring bought, the date of the marriage fixed for April 9, and arrangements made for the ceremony to be performed on that day.

"On March 27, however, the plaintiff was taken ill; she ascribed her illness to the effects of a chill; she was seen on that day by Dr. Jones (who was away and unable to be called at the trial); a further opinion was considered desirable, and she was seen the next day by Dr. Douglas Stanley, of Birmingham, a medical man of experience and authority on diseases of the chest; he was called at the trial and stated that the plaintiff had marked signs of pleurisy, and that her whole condition was tuberculous; that he told the plaintiff she was suffering from pleurisy, not wishing to alarm her; but he formed a very clear opinion that she was suffering from tuberculosis, and so informed the defendant, who had accompanied her to see the physician.

"In any case, her condition was such that the marriage could not take place on April 9.

"The plaintiff, after a short interval, namely, on April 8, entered a sanatorium known as the Nordrach-on-Mendip Institute, where her sister Haidée, who was admittedly suffering from consumption, was already a patient. The defendant paid to the plaintiff's mother a sum of 100*l.* towards expenses at the institute and liabilities incurred for things purchased by the plaintiff with a view to the marriage, and offered to find more money when that sum was exhausted. Disputes, however, arose between the plaintiff's father and the defendant as to which the defendant consulted his solicitor, and on April 14, 1913, the defendant's solicitor wrote to the plaintiff's father a letter in which (after dealing with the disputes) the following passage occurs: 'Mr. Paskell instructs me to say that he is still willing to do what he can for your daughter, but thinks it only right to at once inform you that after earnest consideration he cannot in the present state of your daughter's health contemplate proceeding with the projected marriage.' This letter did not come to the knowledge of the plaintiff until after she had been in the

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sanatorium about five weeks, that is to say, towards the middle of May. The plaintiff remained at the institute until May 24, when on account of expense both the plaintiff and Haidée were removed by their parents and taken to Weston-super-Mare. Haidée ultimately died there from consumption, but the plaintiff rapidly improved in health. She increased in weight, took much exercise, was able to dispense with any medical attendance, and became apparently quite well.

"Shortly before the plaintiff left the institute the defendant went to America on business, and did not return until July. He saw the plaintiff at the end of July, and then quite definitely refused to marry her.

"The plaintiff was examined professionally by Dr. Fligg at Weston-super-Mare on August 12, 1913, when he gave a certificate in the following form, which he said was true and accurate: 'I have this day examined Miss Lillian Ida Jefferson, aged 23, height 5 ft. 3 in., weight 9 st. 6 lbs., a well formed and well developed young woman with a natural healthy colour, and am of opinion that she is in good health.'

"On September 4 the plaintiff's solicitors wrote saying: 'We feel sure you will agree that as our client has fully recovered from her illness she is entitled to know exactly where she stands and what your client's intentions are'; and in reply the defendant's solicitor wrote on September 12 that notwithstanding the defendant's great affection for the plaintiff the contemplated marriage could not now take place, and added: 'It is a most unfortunate result, but it is dictated by the responsible advice which my client has received as to your client's condition of health and the family history on both sides.'

"The writ was thereupon issued on September 23, 1913, and the action was tried by Bray J. and a special jury in November, 1914, when certain questions were left to the jury, which with the answers thereto were as follows:—

"1. Was the plaintiff suffering from tuberculosis (*a*) between the 28th day of March and the 15th day of April, 1913?—Answer: The evidence the jury have heard is not sufficient to satisfy them that the plaintiff was suffering from tuberculosis between the 28th March and 15th April. (*b*) On the 12th September, 1913?—Answer: No.

"2. Was the plaintiff on the 12th day of September in such a condition as to be unfit for marriage within a reasonable time after that day?—Answer: No.

"3. Did the defendant on the said day honestly and on reasonable grounds believe her to be in such a condition as to be unfit for marriage within a reasonable time after the said 12th day of September?—Answer: No.

"4. Did he refuse to marry her on that ground?—Answer: No.

"5. What damages do you find?—500*l*."

The learned judge gave judgment for the plaintiff for 500*l*.

The defendant appealed, and asked for judgment, or in the alternative for a new trial, upon the grounds of misdirection and that the verdict was against the weight of the evidence. The passages in the learned judge's summing-up to the jury which were relied upon as being a misdirection were the following:—

The learned judge at the commencement of his summing-up to the jury said: "The promise is admitted, and of course it is perfectly clear that there was a promise. It is also quite clear that there was a refusal to marry. The defendant sets up, and it is for him to prove his case, that by reason of certain circumstances he was justified in refusing to marry, and therefore there was no breach of contract. He says that the lady's health was such that she was unfit to be married, and there is no doubt that if it be proved that her health was in fact in such a condition that she could not be married within a reasonable time, the defendant would be entitled to refuse to marry her." Later, after having commented on the evidence, the learned judge said: "Now I must say something about the particular issues which you have to decide. Was the plaintiff suffering from tuberculosis (*a*) between March 28 and April 15; (*b*) on September 12, 1913? The first part I have asked at the request of the defendant's counsel, but to my mind the material question is on September 12, because that is when the breach, if there was a breach, took place. You have heard the evidence of the doctors. I must tell you with regard to this that the onus of proof is on the defendant. He has to prove this, and therefore if the evidence leaves you in doubt as to whether she was suffering or not you must say 'No,' or if you like to put it in this way, 'We are not satisfied,' you can put it in that way; but the plaintiff is entitled

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to have your verdict upon that point in her favour unless the defendant has satisfied you of what he alleges, namely, that she was suffering from tuberculosis." And further on he said: "The next question is this: Was the plaintiff on September 12 in such a condition as to be unfit for marriage within a reasonable time after that day? There again it is for the defendant to satisfy you that she was unfit to be married within a reasonable time after that day. Of course that depends to a great extent upon the view you take as to whether she was suffering from tuberculosis. Of course, if you thought she was substantially suffering from tuberculosis on September 12, then you would probably think that she was unfit for marriage."

McCall, *K.C.*, and *H. St. J. Field*, for the defendant. Upon the evidence the jury could only answer the questions left to them in the defendant's favour. At the least their findings were against the weight of the evidence. If, as the evidence showed, the plaintiff was suffering from tuberculosis, the defendant was entitled on that ground to refuse, which he did by the letter of April 14, to perform his promise to marry: *Atchinson* v. *Baker* (1); *Liddell* v. *Easton's Trustees*. (2) In *Hall* v. *Wright* (3) it was decided that bodily illness of the defendant supervening after the contract, which rendered him unfit to marry, was no answer to an action by the other party for breach of promise of marriage. In that case the defendant pleaded his own illness as an excuse for not marrying, but the plaintiff was willing to marry him and insisted upon his carrying out his promise. In the present case the defendant does not set up his own illness, but the illness of the plaintiff. Moreover, if that case is to be taken as laying down a general rule that illness of one of the parties is no excuse for the refusal by the other party to marry, it ought not to be followed. Both in the Court of Queen's Bench and in the Exchequer Chamber there was a great difference of opinion, six judges against five, and the decision was not approved in *Liddell* v. *Easton's Trustees* (2) in the Court of Session, nor in the American case of *Allen* v. *Baker*. (4) [*Harrison* v. *Tennant* (5) was also referred to.]

(1) (1796) Peake, Add. Cas. 103, at p. 104.
(2) 1907 S. C. 154.
(3) E. B. & E. 746, 765.
(4) (1882) 41 Am. Rep. 444.
(5) (1856) 21 Beav. 482.

Next, the defendant is entitled to a new trial on the ground of misdirection. The plaintiff's illness admittedly rendered her unfit to marry on April 9. The onus was then cast upon the plaintiff of showing that she had so recovered from her illness as to be fit to marry within a reasonable time after that date. She had to prove that she was ready and willing to marry on April 9 or within a reasonable time afterwards. Admittedly she was not ready to marry on that date, as she was not fit to marry then, and it lay upon her to prove that she was ready, that is, fit, to marry within a reasonable time after that date. The learned judge misdirected the jury in directing them that it was for the defendant to prove that she was unfit to marry within a reasonable time, and that if the jury were not satisfied of this they ought to find for the plaintiff. This was a misdirection on a material point which may have led the jury to find for the plaintiff, and therefore there ought to be a new trial. [They also contended that the learned judge misdirected the jury in telling them that the breach took place on September 12—the date most favourable to the plaintiff's case—instead of leaving it to them to say whether the refusal to marry took place on April 15, when the defendant's solicitor's letter of April 14 to the plaintiff's father was received, or in May, when that letter was communicated to the plaintiff, or on some other date.]

Further, the evidence shows that the defendant had a reasonable belief that the plaintiff was suffering from tuberculosis at the date when he refused to carry out his promise to marry, and that is an answer to the action. The defendant was informed by the specialist who examined the plaintiff on March 28, 1913, that she was suffering from tuberculosis, and the other doctors confirmed that opinion. The defendant was entitled to act upon the scientific opinion of the medical men, and the conduct of the plaintiff herself confirmed their view. The principle of *Bloomer* v. *Bernstein* (1), *Morgan* v. *Bain* (2), and *Foulkes* v. *Sellway* (3) applies. There was no evidence upon which the jury were entitled to answer questions 3 and 4 as they did.

Marshall-Hall, K.C., and *H. Maddocks*, for the plaintiff, were not called upon on the question of reasonable belief. There was no

(1) (1874) L. R. 9 C. P. 588. (2) (1874) L. R. 10 C. P. 15.
(3) (1800) 3 Esp. 236.

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misdirection by the learned judge. The burden of proving that the plaintiff was not fit to marry within a reasonable time after April 9, the date fixed for the marriage, lay on the defendant. The contract was that the defendant would marry the plaintiff within a reasonable time. The date fixed for the marriage was April 9, but that date was no part of the contract to marry. The promise was a general one—to marry within a reasonable time. The defendant set up the defence that the plaintiff was suffering from tuberculosis in March, 1913, and he had to prove it. He failed to do so. No doubt the plaintiff was not fit to marry on April 9 owing to a temporary illness, but that does not affect her readiness and willingness to marry. "Ready" means ready to marry within a reasonable time, and the plaintiff was always ready in that sense. September 12 was taken to be a reasonable time, and the defendant broke his promise then. The performance of the contract was merely suspended during her illness, and the plaintiff was ready and willing to marry in September. The case was fought at the trial upon the footing that the breach took place on September 12. The onus was on him to show that she had not recovered from her illness within a reasonable time after April 9. The learned judge therefore properly directed the jury upon this point. Even if the onus was on the plaintiff of showing that she was fit to marry within a reasonable time, she discharged that onus. The medical evidence showed that she had recovered from her illness on August 12. Therefore, even if there was a technical misdirection, no substantial wrong or miscarriage was occasioned thereby, and the Court will not order a new trial: Order XXXIX., r. 6.

Next, the illness of the plaintiff is not a sufficient excuse for the defendant refusing to carry out his promise to marry. The contract to marry is a contract to enter into the state of matrimony, and if the plaintiff is able to go through the ceremony of marriage the illness of the plaintiff is no excuse. Lord Campbell C.J. in *Hall* v. *Wright* (1) disapproved of the observation of Lord Kenyon C.J. in *Atchinson* v. *Baker* (2) and said: "As yet there has been no decision that for anything supervening after the contract to marry, unfitting either party fully to perform the duties of the married state, the party so unfitted may treat the contract as dissolved, the other still desiring

(1) E. B. & E. at p. 761. (2) Peake, Add. Cas. 103, at p. 104.

that the marriage ceremony should be performed." This judgment was affirmed by the majority of the judges in the Exchequer Chamber, and was followed in *Baker* v. *Cartwright* (1), the report in the *Law Journal* making it clear that the case was decided upon the authority of *Hall* v. *Wright*. (2) If in fact the plaintiff was on April 9 suffering from an illness which prevented her from marrying the defendant on that day, a reasonable time must be allowed for the plaintiff to recover from the illness and to become fit to marry. Her illness merely gave a reason for delay, and did not relieve the defendant of his obligation to perform the contract. The jury have found, upon evidence which justified them in so finding, that the plaintiff was fit for marriage on September 12, that is, within a reasonable time. [They also contended that the verdict was not against the weight of the evidence.]

McCall, K.C., in reply. Admittedly the plaintiff was unfit to marry on April 9 through illness, and the learned judge misdirected the jury as to the onus of proving that she had recovered from her illness within a reasonable time. If this had been properly explained to the jury, they might have found the other way. The Court ought therefore to grant a new trial: *Jones* v. *Spencer*. (3)

Cur. adv. vult.

Oct. 29. SWINFEN EADY L.J. read the following judgment:— The defendant on this appeal asks for judgment or a new trial, the plaintiff having obtained a verdict and judgment for 500*l.* damages.

The action is for breach of promise of marriage. [The Lord Justice stated the facts as above set out.]

The defendant complains of misdirection, and that the verdict was against the weight of the evidence; he also complains of insufficient direction, that the jury did not have such assistance from the judge as they were entitled to, and he relies especially upon the fact that in dealing with the X-ray examination of the plaintiff the judge did not in his summing-up refer to the fact that Dr. Harman Brown was present on behalf of the plaintiff, but was not called at the trial. The misdirection complained of is that

(1) (1861) 10 C. B. (N.S.) 124; 30 L. J. (C.P.) 364.
(2) E. B. & E. 746, 765.
(3) (1897) 77 L. T. 536.

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the judge wrongly ruled that the breach of contract was in September. It was contended that he ought either to have left the date to the jury, or to have ruled that the date was either April 14, when the letter to the father was written, or in May, when the contents of it were communicated to the plaintiff, or July 29, the last interview with the plaintiff, when the defendant certainly refused to marry the plaintiff. The further misdirection complained of is that the judge told the jury that the burden of proof was on the defendant. The judge said (in an early part of his summing-up): "The defendant sets up, and it is for him to prove his case, that by reason of certain circumstances he was justified in refusing to marry, and therefore there was no breach of contract." And again, later on in his summing-up he said this: [The Lord Justice read the second of the two passages set out above.]

In considering this case, the main contention on the one side and on the other must always be borne in mind. It being common ground that on the actual date fixed for the marriage (April 9, 1913) the plaintiff was unwell, and that it was quite obvious that the wedding must be postponed on that account, the defendant alleges that she was then suffering from tuberculosis, that he produced medical evidence to that effect, and that she had not recovered from this disease by September, and therefore certainly not by July. The plaintiff's case, on the other hand, is that she was suffering in April from the effects of a chill caught perhaps on March 27; that she had an attack of pleurisy, but not tuberculosis; that she never suffered from tuberculosis; that she was well by May 27, 1913, when examined by Dr. Fligg; that in July, 1913, when she met the defendant on his return from America, she was in complete health; that the certificate given by Dr. Fligg on August 12, 1913, was completely true; that she was then in good health; and that the contention that two or three months previously she had been in consumption was quite unfounded. Those were the principal contentions of the respective parties.

The plaintiff's pleading contains by implication (Order XIX., r. 14) an allegation that she is and always has been ready and willing to marry the defendant. The defendant meets this by alleging (paragraph 3 of the defence) that on March 27, 1913 (before the date

fixed for the wedding), he "discovered, as the fact was, that . . . . the plaintiff had contracted the disease of tuberculosis," and "the plaintiff continued to suffer from the said disease from the 27th March, 1913 (or thereabouts), until the commencement of this action"; and in paragraph 5 of his defence he pleads that by reason of the facts mentioned in paragraph 3 the plaintiff was never ready and willing to marry the defendant. The plaintiff having given general evidence of her good health within a short time after the date fixed for the wedding, the burden of proving that she was then suffering from the disease of tuberculosis rested upon the defendant, who alleged it. The defendant alleging and the plaintiff denying the existence of the disease, the burden was not upon her of proving the negative, but upon the defendant to prove his allegation. "Ei qui affirmat non ei qui negat incumbit probatio." This is the burden of proof to which the judge referred in his summing-up. It is true that the judge did not point out to the jury that in the first instance the burden was upon the plaintiff to prove that she was ready, in the sense of being in a state of bodily fitness, and no longer prevented by the state of her health, as she admittedly was on April 9, yet this burden was prima facie discharged by the plaintiff's appearance at the trial apparently in good health, and by the medical evidence called on her behalf, and the real and substantial question between the parties was whether the plaintiff was suffering from tuberculosis, as alleged by the defendant, and the burden of proving this was upon the defendant, who alleged it. The point as to the burden of proof in the first instance is, in the present case, an academic one.

With regard to the other alleged misdirection, namely, the judge ruling that the breach was in September, instead of either leaving it to the jury or holding it to have been on April 14 or in July, it is manifest that the letter of April 14 did not then amount to a breach, as it was not written to the plaintiff and did not come to her knowledge until after she had been in the sanatorium about five weeks. No point was made at the trial as to whether the breach was in July or September; the jury negatived that the plaintiff was suffering from tuberculosis on September 12, 1913, and there was no evidence of any change in the plaintiff's condition between July and September. There was evidence that in July the defendant absolutely

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refused to marry the plaintiff, but no question of whether there was a breach in July is raised by the pleadings; the plaintiff alleges a refusal by the letter of September 12, and the defendant does not dispute this, but sets up a rescission in April, which was not substantiated. Nor do I find from the shorthand notes that the judge was asked to leave to the jury any question of a breach in July, although at one time when Dr. Thurnam was in the witness-box the judge said that one question for the jury would be whether the refusal at the end of July was justified.

Under these circumstances I am of opinion that no substantial wrong or miscarriage has been occasioned by the judge directing the jury that there was no breach before September 12, and a new trial ought not to be ordered on that account.

The defendant by amendment raised a further point, by way of defence, that he honestly and on reasonable grounds believed the plaintiff to be unfit for marriage. The jury negatived this in fact, and the defendant says that the verdict of the jury on this point is against the weight of evidence. In my opinion this point, even if the jury had found in the defendant's favour, would be no defence in law. If the plaintiff was not in fact unfit for marriage, the fact that the defendant honestly and on reasonable grounds believed that she was unfit might affect the amount of the damages, but would not affect the plaintiff's right to recover. And no complaint is made by the defendant that the damages are excessive. The case of *Baddeley* v. *Mortlock* (1) is in point. It was an action for breach of promise of marriage brought by a man against a woman. The woman, having heard of charges being made against the man of dishonesty and perjury, said that unless he vindicated himself she would not marry him, and upon his omitting to do so broke off the match. It appears from the judgment that the mere belief that the charges were true was no defence in law. Gibbs C.J. said: "She must show that the plaintiff is a man of bad character . . . . Without proof that the charges were founded, she is not absolved from her contract. But it affects the damages." The plaintiff recovered a verdict for one shilling damages.

[The Lord Justice then dealt with the point about the X-ray examination and also with the contention that the verdict was

(1) (1816) Holt N. P. C. 151.

against the weight of evidence. There was medical evidence each way, and the contention could not, in his opinion, be supported.]

The other matters complained of in the summing-up are of minor importance, and I am satisfied that no substantial wrong or injustice has been occasioned to the defendant by any of the matters complained of.

In my opinion the appeal fails and should be dismissed.

PHILLIMORE L.J. read the following judgment:—The plaintiff, a young woman of twenty-two, brings this action for breach of promise of marriage against the defendant, a man of thirty-nine. In her statement of claim she alleges an engagement in 1912, and the fixing of the day of marriage, first for March 28, and then for April 9, 1913, and the breach of which she complains is that the man did not marry her then or within a reasonable time thereafter. She also states, but apparently rather as evidence or confirmation of the breach than as in itself a breach, a positive refusal by letter on September 12. In his defence the man admits the engagement in 1912, though not so early in the year, and the fixing of the date of marriage for April 9. He proceeds to state that by letter dated April 14 he refused to marry the woman, and he justifies his refusal by saying that she had contracted tuberculosis. He further pleads that she was never ready and willing to marry him.

The facts of the case have been fully stated by Swinfen Eady L.J. [Having stated the effect of the medical evidence at the trial, the Lord Justice continued:] The jury had the advantage of seeing the woman and judging of her appearance at the trial in July, 1914. Swinfen Eady L.J. has stated the questions put to the jury and their answers.

I will deal first with the questions 3 and 4, which were put in consequence of an amended defence which the man was allowed to raise at the trial, to the effect that he honestly believed her to be unfit for marriage within a reasonable time; and it is best in the first instance to determine upon its validity. I am of opinion that it is not a valid defence. A contract of marriage is in this respect like any other contract. The justification for the refusal to carry it out must be found in the actual facts, and not on belief or opinion, however reasonable or honest, as to what the facts are.

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If instead of want of health the question had been one of want of chastity, it will be very apparent that the objective truth, and not the subjective belief, would have to be looked for. This being so, it is unnecessary to inquire whether the answers of the jury to the two questions 3 and 4 were or were not justified by the evidence.

Another point lies in limine. It was contended by counsel for the woman that ill-health is not a justification for refusal to perform the promise to marry, and for this the case of *Hall* v. *Wright* (1) was cited. This case has been much observed upon ; but it is unnecessary to consider its weight, because it has no bearing upon the one before us. In *Hall* v. *Wright* (1) the man pleaded his supervening ill-health as his justification for refusal. The woman was willing to marry him notwithstanding. Whether the decision was that in no case could a party rely on his or her own ill-health as a justification, or whether, as some have thought, the case turned upon a point of pleading or upon the insufficiency of the degree of ill-health pleaded, it has no bearing upon a case where the ill-health is that of the insisting party. On principle it would seem that there must be some cases of mental or physical infirmity (as it has been decided that there are cases of moral infirmity) which supervening after the promise, or, I would add, first coming to the knowledge of the party after the promise, will justify him or her in refusing to marry.

The matter is therefore clear for considering questions and answers 1 and 2.

It is contended for the man that the answers are unreasonable and that the verdict is against the weight of evidence and should be set aside ; and it is further contended that there was misdirection. After consideration and reading the medical evidence again, I do not think that the balance is so strongly the other way that if the jury was properly directed the verdict could be set aside.

There is more difficulty about the misdirection. Two complaints are made : (1.) That the date of the breach was material, and the judge assumed the date most favourable to the woman, whereas he ought to have taken another date, or at least to have left it to the jury. (2.) That whenever he dealt with the burden of proof he put it upon the man. There are certainly points in the handling of the case by the learned judge which are not satisfactory and which

(1) E. B. & E. 746, 765.

put difficulty in the way of the woman keeping her verdict. We have to see if they are sufficient to entitle the man to a new trial. As to (1.), the woman in her statement of claim gave, as already stated, no precise date for the breach, laying it merely as a refusal to marry within a reasonable time after March 28 or April 9. The man put the breach when his solicitor's letter of April 14 would be received. The judge intimated most strongly his opinion that the true date was September 12, and though, upon the insistence of the man's counsel, he put question 1 with alternative dates, he gave no such alternative for question 2. There are four possible dates—April 15, an early day in May, July 29, and September 12. I agree that April 15 as an exact date may be ruled out. The letter was not to her, and for reasons of kindness to her it was not intended to reach her then. But it was intended to reach her in time, and it did reach her early in May. The date in May on which she had knowledge of the letter of April 14 is important. If there was no breach in May there almost certainly was on July 29, and it was wrong to suggest that the breach did not take place until September 12. But though the judge did once intimate that the July date might be the right one, neither side asked him to put the July date, and there was no evidence that the state of the woman's health materially differed from July 29 to September 12. The two dates, therefore, to be discussed were early May and September 12, and unfortunately the judge never left to the jury the question which was the right one.

Upon the other question the learned judge directed the jury that the burden of proof that the woman was unfit for marriage on September 12, which is the date he takes, was on the man. In this he is in my view wrong. In every contract the party who seeks to recover damages for the breach must prove that he or she was ready and willing to perform it. Now admittedly on the date fixed for the marriage, that was April 9, the woman was not ready ; she was not fit. The burden of proof was upon her to show that she would be fit within a reasonable time or that she actually became fit before breach. There was no burden upon the man to show that she was unfit. But when the woman admitted that she was not fit on April 9 she admitted no more. She did not admit that she had a permanent or even a prolonged illness. The man, if he relied on her

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having tuberculosis or any other permanent or prolonged illness, had to prove it, and the learned judge rightly laid the onus on him so far, and the question was rightly put as to tuberculosis, Are you satisfied that she had it ? If she did not have tuberculosis in April or in September, then all that she has to prove is that from whatever illness she had in April either she would recover in a reasonable time, or did actually recover before breach. And if it was not tuberculosis in April, if for instance it was pneumonia or even pleurisy, there is no serious question that she had recovered by the end of July. The jury were rightly directed upon question 1, and if their verdict on this question was right the misdirection upon question 2 becomes unimportant, nor does it matter which was the date of the breach. The misdirections, therefore, both as to date of breach and as to burden of proof, come within Order XXXIX., r. 6—no "substantial wrong or miscarriage has been thereby occasioned"—and do not compel us to grant a new trial. If she had not tuberculosis in April, she had only an illness which would not prevent her marrying within a reasonable time.

It matters not whether the breach was in April or May or July or September. If it was either of the two former, she was not in a state of health which justified the man in thinking that she would not be fit to marry within a reasonable time. If it was either of the two latter, she had recovered, and so plainly recovered (tuberculosis being out of the way) as to make the burden of proof an academical question.

Upon the whole, though, as I have said, there were in my opinion misdirections, they are not of sufficient importance to have affected the verdict, and we ought not to grant a new trial.

PICKFORD L.J. read the following judgment :—This was an action for breach of promise of marriage in which judgment was given for the plaintiff upon certain findings of the jury. The defendant by his appeal asks for judgment or a new trial, but in substance his application is for a new trial upon the grounds of misdirection and of the verdict being against the weight of evidence.

It is not necessary to repeat the facts.

The defence set up to the action by the defendant was that the plaintiff was suffering from tuberculosis on March 27, 1913, and

from that date continuously until the commencement of the action. He also, by amendment during the trial, alleged as a defence that he reasonably believed her to be so suffering, and was on that ground exonerated from his promise. The questions put to the jury and their answers have already been stated, and I need not repeat them. I do not think that, strictly speaking, the right questions were put to the jury, but if the first finding stands, this is of no consequence, as the only suggested defence was tuberculosis, and there is no ground for contending that if she were not suffering from that disease in March and April, 1913, she ever suffered from it at all.

With regard to the defence raised by amendment, the plaintiff contended that it was no defence to an action for a breach of promise to marry that the defendant reasonably believed that the plaintiff was so ill as to be unfit to marry, if in fact that belief was wrong. I am of opinion that this contention is correct, and that such reasonable but unfounded belief affords no defence.

The plaintiff also contended that, even if she were suffering from tuberculosis, that afforded no defence, while the defendant's contention seemed to me to go so far as to allege that if a woman had ever suffered from that disease she could never enforce a promise to marry. I am not prepared, as at present advised, to accept a contention so wide as the defendant's, but I think there may be tuberculosis existing to such an extent and of such a nature as to make the woman unfit for marriage, and therefore to afford a defence.

It remains, therefore, to be seen whether the jury's answer to the first question can be supported. The defendant alleged the breach of the promise to have taken place on April 14, the plaintiff on September 12. I am not satisfied that either of these was the correct date, but if the first answer is correct the date becomes immaterial. The defendant objects to this finding, first, on the ground of misdirection, and the misdirections alleged are, in substance, (1.) that the learned judge was wrong in directing the jury that the onus of proving that the plaintiff was suffering from tuberculosis and unfit for marriage was upon the defendant; and (2.) that he misled them by insufficient and incorrect direction as to the evidence. The passages as to the onus of proof to which objection was chiefly taken are those read by Swinfen Eady L.J.

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Pickford L.J.

I think that a plaintiff in an action of breach of promise, as in any other action of breach of contract, must prove that she is ready and willing to perform the contract, and an allegation to that effect was always contained in the older and more precise pleadings, and is now, according to Order XIX., r. 14, to be implied. Ready includes, in my opinion, not being unfit by reason of illness. But very slight evidence is sufficient to discharge such an onus in the absence of contradiction, such as that she was following the ordinary pursuits of life.

This case is not quite so simple, as the plaintiff was, on the date fixed for the marriage, admittedly unfit to carry out the contract by reason of illness. The obligation on the defendant then became one to marry her in a reasonable time after that date, and I think there was the obligation upon her to show that a reasonable time had elapsed, and that she was ready and willing. But again I do not think that much evidence was necessary to enable her to discharge that onus, and I think she discharged it. She showed that she began almost at once to improve in health, and continued to do so, that in May and onwards she was following the ordinary avocations of life, and that the doctor who attended her considered her in good health. This would, unless displaced by evidence given on behalf of the defendant, entitle her to succeed on that question, and it was therefore necessary for the defendant to give such evidence and displace that given for the plaintiff. This he undertook to do by showing that she was in March and April suffering from tuberculosis, and therefore, although apparently well, was not really so, and was unfit for marriage. Unless he proved this, there was nothing to displace the case made by the plaintiff. This was the state of the evidence upon which the learned judge was directing the jury, and therefore, though I am not satisfied that his direction as to the onus of proof was strictly correct, I think it not unfairly represented the matters to be considered by the jury, and that even if it were not strictly correct they were not misled, and there was no miscarriage of justice in consequence of its incorrectness.

With regard to his direction as to the evidence, I think a judge is entitled to give the jury his views of the evidence, and is not obliged to detail to them every part of it, or every view which each party wishes them to take, so long as he does not mislead them as to the

matters they have to consider, or the evidence in the light of which they must consider them. I cannot see that the learned judge has done so in this case. Perhaps after so lengthy a trial he might have discussed the medical evidence in somewhat more detail, but I can see no reason for saying that the jury were in any way misled.

I think there is no objection to the finding on the ground of misdirection.

Then if the jury were properly directed, I do not think the verdict can be disturbed on the ground that it was against the weight of evidence. I do not think it necessary to go through the evidence. I think there was material upon which the jury could reasonably come to their conclusion, and it is material to notice that on this point the learned judge, who, like the jury, saw and heard the witnesses, agreed with the verdict. I do not, therefore, think that the first finding of the jury should be disturbed, and in that case it is unnecessary to consider the rest of the case, but I think it right to say that, if it were necessary to consider it, I have great doubt whether the third and fourth answers could be supported on the evidence.

In my opinion the appeal fails and should be dismissed.

Application dismissed.

Solicitors for plaintiff: *Maddocks & Colson, for Band, Hatton & Co., Coventry.*

Solicitors for defendant: *Field, Roscoe & Co., for Ansell & Sherwin, Birmingham.*

W. F. B.

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1915
Oct. 29;
Nov. 1.

[IN THE COURT OF APPEAL.]

MADDEN *v.* EXECUTORS OF RICHARD GUEST.

Employer and Workman — Compensation — Agreement — Recording — Inference from Evidence—Receipt—Finding of Fact—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. II., par.* 9.

A workman who had received compensation under the Workmen's Compensation Act, 1906, applied to have an agreement with the employers recorded. He alleged that the terms of the agreement were contained in certain receipts, but this was denied by the employers, and the county court judge declined to infer that there had been any such agreement and dismissed the application:—

Held, on appeal, that the refusal to infer an agreement was a finding of fact by the county court judge, and that he was not bound to infer an agreement from the receipts.

Babcock & Wilcox v. *Pearson* (1913) 6 B. W. C. C. 841 distinguished; *Scott* v. *Sanquhar and Kirkconnel Collieries* (1915) 8 B. W. C. C. 405 dissented from.

Appeal from an award of the judge of the Colne and Nelson County Court, sitting as arbitrator under the Workmen's Compensation Act, 1906.

John Madden was a labourer employed by the executors of R. Guest, and on December 4, 1914, he met with an accident and broke his thigh. The accident and injuries were admitted by the employers, and the average weekly earnings were agreed at 1*l.* 5*s.* 11*d.* Compensation at the rate of 12*s.* 11½*d.* a week was paid to Madden, and on February 12, 1915, he signed a receipt in the following form: "Received of the executors of R. Guest per the Law Accident Insurance Soc., Ld., the sum of 6*l.* 9*s.* 7*d.* being weekly compensation to date under the Workmen's Compensation Act, 1906, under which Act I elect to claim for personal injury by accident sustained by me on or about the 4th December, 1914." From that time the compensation was paid regularly, and fortnightly receipts in similar form were signed until March 19, 1915, when the workman applied to have a memorandum of agreement recorded.

The application alleged that on or about the 12th day of February, 1915, the following agreement was come to by and between the said

John Madden (thereinafter called the applicant) and the executors of Richard Guest (thereinafter called the respondents), that is to say: "The respondents agreed to pay to the applicant compensation under the Workmen's Compensation Act 1906 at the rate of 12*s.* 11½*d.* sterling per week, being 50 per cent. of his average weekly earnings, beginning the first payment as at the 11th day of December 1914 and continuing the payment thereof until the same is ended, diminished, redeemed or suspended in terms of the above-mentioned Act." The employers objected that they only agreed to pay compensation at the rate of 12*s.* 11½*d.* per week during total incapacity.

It was stated that the form of the receipts was in the exact terms of the receipt given in *Babcock & Wilcox* v. *Pearson* (1) and that the memorandum of agreement was in the precise terms of that ordered to be recorded in that case. The application came before the Court on the documentary evidence, and the learned judge refused to infer from the wording of the receipts that an agreement in the form proposed by the applicant was ever come to, and said that if he inferred anything it would be that an agreement such as the employers admitted was come to. He doubted whether he ought to infer even so much, and dismissed the application with costs.

The applicant appealed on the grounds, first, that the learned judge was wrong in law and misdirected himself in holding that there was any evidence before him on which he could find that the said agreement had not been made between the parties; and secondly, that the learned judge misdirected himself in law in finding on the evidence before him that the said agreement was not come to between the parties and was wrong in holding that he could not find that the said agreement was made.

S. L. Porter, for the appellant. The employers have admitted that there was an injury by accident arising out of and in the course of the employment and have paid the maximum amount of compensation, the only question being as to the recording of an agreement in the terms suggested by the appellant. The employers deny that any agreement to that effect has been established. The

(1) 6 B. W. C. C. 841.

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agreement which the appellant desires to have recorded is substantially in the same form as that which was recorded in the Scotch case of *Babcock & Wilcox* v. *Pearson*. (1) In that case it was held that an agreement might be inferred from the form of the receipts. From the form of the receipts in this case an agreement by the employers may be inferred to pay compensation during total or partial incapacity in accordance with the terms of the Act. That is the ordinary form of an award under the Act: Workmen's Compensation Rules, Form 24. *Scott* v. *Sanquhar and Kirkconnel Collieries Co.* (2), another Scotch case, is even more strongly in favour of this argument.

In *Phillips* v. *Vickers, Sons & Maxim* (3) there was a specific offer by the employers, and of course no other agreement could be inferred: see also *Hartshorne* v. *Coppice Colliery Co.* (4) Unless the workman can have the agreement recorded he has no remedy, because according to *Payne* v. *N. Fortescue & Sons* (5) the arbitrator would have no jurisdiction to entertain an application for arbitration.

Harold Morris, for the respondents. All that the county court judge here had to consider was whether there was any agreement to record, and he has rightly held that there was none. It is said that unless the agreement is recorded the workman will have no remedy because he cannot go to arbitration; but see *Summerlee Iron Co.* v. *Freeland* (6), where Lord Shaw points out, at p. 227, what the workman's right is. In *Payne* v. *N. Fortescue & Sons* (5) the workman had accepted what was offered by the employer, and the Court decided that no arbitration could be held. *Cooper* v. *Wales* (7) shows that the workman is in no difficulty, because if the employer does not admit liability except during total incapacity the workman can go to arbitration. Here the employers said that they would pay a certain sum during total incapacity and no more. The workman said he would not take it on those terms, and he could therefore go to arbitration. That is different from saying that there could be no agreement to that effect. The only agreement by the

(1) 6 B. W. C. C. 841.
(2) 8 B. W. C. C. 405.
(3) [1912] 1 K. B. 16.
(4) (1912) 5 B. W. C. C. 358.
(5) [1912] 3 K. B. 346.
(6) [1913] A. C. 221.
(7) [1915] 3 K. B. 210.

employers here is that the compensation should be paid during total incapacity. This case is covered by *Hartshorne* v. *Coppice Colliery Co.* (1)

It may be that the Scotch Courts have taken rather a different view, but this Court is not bound by their decisions. The only agreement to be implied here is to pay compensation during total incapacity. If that is not the agreement, then there is nothing to record.

It is not reasonable to suppose that the employers would have agreed to the proposed terms: *Maundrell* v. *Dunkeston Collieries Co.* (2) A receipt is not an agreement to pay in the future. The learned judge's decision is a finding of fact, with which this Court will not interfere.

S. L. Porter in reply. The learned judge's finding is a finding of law; the facts were agreed. The Scotch cases are conclusive to show that there is sufficient evidence of this agreement.

LORD COZENS-HARDY M.R. This is an appeal from the learned county court judge of Lancashire refusing to record an agreement which the workman sought to have recorded. The accident was admitted. The employers have paid 12*s.* 11½*d.*, which is the maximum amount, being the half of the wages, and the workman seeks to have recorded this agreement: "The respondents agree to pay to the applicant compensation under the Workmen's Compensation Act 1906 at the rate of 12*s.* 11½*d.* sterling per week, being 50 per cent. of his average weekly earnings, beginning the first payment as at the 11th day of December 1914 and continuing the payment thereof until the same is ended, diminished, redeemed or suspended in terms of the above mentioned Act." The employers denied that there was any such agreement as it was sought to register, and said: "We are willing to have recorded an agreement if you limit it to total incapacity." It is quite clear that the jurisdiction of recording an agreement can only be exercised, can only exist in fact, if in truth there is an agreement. An agreement may be found in writing expressly or it may be inferred, but an agreement is not lightly to be inferred. Now here the only circumstances suggested to the learned county court judge were these: that

(1) 5 B. W. C. C. 358. (2) (1910) 4 B. W. C. C. 76.

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payments were made, and receipts given, one of which I will read, because they are all in the same form : " Received of the executors of R. Guest "—that is the employers—" per the Law Accident Insurance Soc., Ld., the sum of 6*l.* 9*s.* 7*d.* being weekly compensation to date under the Workmen's Compensation Act, 1906, under which Act I elect to claim for personal injury by accident sustained by me on or about the 4th December, 1914." That is to say, " I do not claim under the old Employers' Liability Act, but under the Workmen's Compensation Act ; I elect, and that is my election." It is said that the effect of those receipts, in identical terms, is that there was an agreement between the employer and the workman that this 12*s.* 11½*d.* should continue until the same was ended, diminished, redeemed, or suspended, in the terms of the Act. It is quite clear when you look at the correspondence that the parties took different views of the rights of the man. The employers said : " We will not object to your agreement if you limit it to total incapacity." The letters are quite explicit on that point. In those circumstances, there being no other evidence before the learned county court judge, he found as a fact—and I say that deliberately—that there was no agreement between the parties which he ought to infer. The parties never were ad idem, and he says : " There is a very substantial difference between the agreement which the applicant says was come to and that which the respondents admit was come to. I cannot infer from the wording of the receipts that an agreement in the form proposed by the applicant ever was come to. If I inferred anything it would be that an agreement such as the respondents admit was come to. But I doubt whether I ought to infer even so much."

Is there any misdirection of the learned judge there ? In my opinion there plainly is not. The receipts, of course, are not in any shape or form an agreement binding the employers or in form an agreement binding anybody. They are not signed by or on behalf of the employers. They are merely an acknowledgment by the man that a certain sum was paid to him while he was totally incapacitated in truth and in fact. Then we are asked to say the Scotch Courts have held that the mere form of receipt for weekly payments is sufficient to justify and indeed entitle the Court to

say that there was an agreement in the full terms of the Act; that is to say, to pay compensation until the same is ended, diminished, redeemed, or suspended in the terms of the Act. When one looks at the two Scotch authorities which have been referred to, there is no necessity to say that they have decided this point, though if they have done so it is not obligatory on us to follow their decision. The first case of *Babcock & Wilcox* v. *Pearson* (1) creates no difficulty. There the learned county court judge had in terms found that an agreement was made between the parties before the first payment of compensation was made, and that being so he recorded the agreement. The Court of Session affirmed his decision. Of the four judges in the Court of Session three based their judgment solely upon the agreement, which had been proved by evidence in the box as well as by the receipts. It is quite true that the Lord President, basing his judgment on that point, did also say that he might have inferred such an agreement from the mere form of the receipts. That is a mere dictum of the Lord President, a dictum which is entitled to the utmost respect, but is not in any way a decision which we are bound to follow, that the form of the receipts which have been given here was such as to make it wrong for the learned county court judge not to adopt them and say they constituted an agreement. The second case referred to, *Scott* v. *Sanquhar and Kirkconnel Collieries Co.* (2), is a case which, if I may respectfully say so, cannot be followed. It was a case where an infant met with an accident. He was entitled under the provisions of the Act, so long as he was a minor, to receive more than half wages, 10*s.* a week, and he obtained the recording of an agreement which would make that payment of 10*s.* a week last after minority, although that would be entirely contrary to the language of the Act. The learned judge there took a view of the effect of such an agreement which, with the greatest possible respect, I am quite unable to follow. Perhaps I might quote one sentence from a judgment of my own in the case of *Maundrell* v. *Dunkeston Collieries Co.* (3): "It was not for a moment in their contemplation, and it is hard to conceive that any employer whose liability to pay during total incapacity a maximum sum of so much,

(1) 6 B. W. C. C. 841. (2) 8 B. W. C. C. 405.
(3) 4 B. W. C. C. 76

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would agree to pay the same sum during partial incapacity." I would merely qualify that by saying that it is impossible to suppose that the employers would agree to pay 10*s.* a week, which is what the man could legally obtain, or that they would agree to pay that sum during total incapacity after minority. I think there was a misconception in that case of *Scott* v. *Sanquhar and Kirkconnel Collieries Co.* (1), and that it is a case which we cannot follow. We are totally unable to say that there was any misdirection which would justify us in saying that we can get behind this finding, because the county court judge was bound as a matter of law to infer from that, which was not certainly in the form of an agreement, such an agreement as is suggested. In my opinion the parties never were ad idem. There never was any agreement in form which could have been recorded, although the employers said: "If you like to record an agreement you can have it in the terms that we agree to." There never was in any sense here any agreement which there was jurisdiction to record.

In my opinion the judgment of the learned county court judge was quite right, and the appeal must be dismissed.

BANKES L.J. I agree. The question before the county court judge was whether he should record an agreement which was said to have been come to with reference to the amount of compensation payable to the workman. The case was peculiar in some respects, because each party was contending that an agreement had been made, but each was asking the county court judge to record his particular version of it. The learned county court judge had no discretion to accept or to frame for himself any other agreement than the one the parties were contending for. He must either accept the one agreement or the other agreement and record it, or he must dismiss the application. This is a case in which there was no agreement in form, in the sense that there was no formal written document, and personally I must say I think it is a great pity that there is not a statutory form of agreement which should be entered into if the parties desire to enter into an agreement. Instead of that apparently there have been cases in which the Courts have been asked to spell out agreements from certain docu-

(1) 8 B. W. C. C. 405.

ments and from the relations between the parties and what they have said and done, and this is one of those cases. There was certain correspondence which took place: there was the fact that the man was at the time incapacitated; there was the fact that the employers were prepared to pay him a sum of 12*s.* 11½*d.* per week, and were indicating by their letters that they were prepared to continue that payment; there was the fact that receipts were signed; and from those facts the learned county court judge was asked to infer this agreement. If the matter had been open to him or open to me I should be inclined to think possibly that there was an agreement, but it certainly was not the agreement that either party was putting forward. There may have been—I am not saying there was—evidence upon which it would be proper to find that the employers did agree to this extent, that they admitted liability to pay compensation under the Act, and agreed to pay a particular sum of 12*s.* 11½*d.*, if and so long as the workman continued to be totally incapacitated; but that was not the case put forward either on the one side or on the other. What the workman contended for was that upon these facts the county court judge ought to come to the inference that the employers had agreed to pay at the rate of 12*s.* 11½*d.* per week until the same was ended, diminished, redeemed, or suspended in the terms of the above Act, which means to say that the employers agreed to pay 12*s.* 11½*d.* every week until they had had the opportunity of going to the Court and making an application and satisfying the Court that that amount ought to be reduced. Now all I can say for myself is that it is asking one to bury one's common sense to suppose that the employers ever intended to agree to anything of the sort. The utmost that they agreed, if they agreed at all, was to pay 12*s.* 11½*d.* so long as the man remained in their opinion totally incapacitated, and that when they were satisfied that he had ceased to be totally incapacitated they would cease to make that payment. Then the question might arise what the proper payment ought to be; but that they agreed to pay until the time elapsed, however long that might be before they could get to the county court judge to consider his case, is in my opinion a proposition which it is perfectly impossible to ask any one to accept. I think the contention of the employers is equally impossible, because their contention is that the workman agreed

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to accept compensation if and so long only as he was totally incapacitated and that there was no agreement to pay him anything if he became partially incapacitated. It is quite as impossible to accept that proposition as it is to accept the other. In my opinion the judge was perfectly right in drawing the inference that the parties never were ad idem, and that it would not be proper to record the agreement put forward on either side. I cannot see how it is possible to contend that as a matter of law the learned judge went wrong in drawing the inference he did on the facts before him. I wish to add that I thoroughly agree with what the Master of the Rolls has said about the Scotch cases.

WARRINGTON L.J. I am of the same opinion. The evidence before the learned county court judge fully justified him in saying that the parties never were ad idem, and that there never was any agreement between them at all. Now there is no particular magic about agreements to pay compensation under the Act. It seems to me that one must deal with an alleged agreement under the Act in the same way for the purpose of seeing whether it exists or not as with any other agreement. You must find whether the parties agreed on both sides to pursue a certain course. What have we here? First we have employers' liability. The employers, I think, really do admit that there was an accident arising out of and in the course of the employment. There is a recognition of the fact that at the moment the workman was totally incapacitated. We have past compensation paid at the full rate on the agreed earnings of the workman to which he was entitled, and we did get in the letter of February 17 a promise of future payment, but we get no further. We have not any agreement fixing the amount of that future payment; at the outside it could only be inferred that it was to continue at the then present amount so long as the then present circumstances continued, even if we could infer that; but we certainly have no agreement between the parties as to the payment of future compensation under circumstances other than those existing, or of any other definite sum. Under these circumstances I think on the alleged agreement coming before the Court for a decision whether there was any agreement or not the

Court could only come to one conclusion, namely, that the parties had never agreed to anything. I agree with the observations which have been made on the Scotch cases.

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Appeal dismissed.

Solicitors: *James Chapman & Co., Manchester; Lawrence Jones & Co, for Barlow & Rowland, Accrington.*

H. C. R.

[IN THE COURT OF APPEAL.]

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MORELAND & SONS *v.* ELEY.
ELEY *v.* MORELAND & SONS.

Employer and Workman—Compensation—Review of Weekly Payments—Redemption—Infant—Service irregular—Waiver by Appearance—Indefeasible Right to Redemption—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., pars.* 16, 17.

The rights given to a workman by Sched. I., par. 16, and to the employer by Sched. I., par. 17, of the Workmen's Compensation Act, 1906, are co-equal rights, and the fact that the employer's application to redeem on the footing of existing facts is prior in date to the application of an infant workman for an increase of compensation does not give the former an absolute indefeasible right to his order.

The claimant, a girl of thirteen, met with an accident in April, 1910, which left her right hand useless. Liability under the Act was admitted, and the employers paid her her full wages, 5*s.* 5*d.* a week, as compensation. In 1911 an agreement was recorded whereby the employers found her light work at 3*s.* a week, and the compensation was reduced to 2*s.* 5*d.* In March, 1912, the employers applied for redemption of their liability. Notice of the application was not properly served on the claimant, but a solicitor appeared under protest for her at the hearing of the application for redemption and took the objection of want of service. The claimant applied for an increase of compensation, and both applications came on for hearing on the same day, that of the employers being first in the list. The county court judge refused, on the ground of want of service, to hear the application for redemption, and on the application of the claimant increased the compensation to 5*s.* 6*d.* a week, with costs of both applications to be paid by the employers:—

Held, that the defect in service had been waived by the appearance of the solicitor for the claimant, but that the employers had no such

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indefeasible right to have their application for redemption heard first as could prevent the learned judge from exercising his discretion as he had done.

APPEAL from an award of the judge of the Gloucester County Court, sitting as arbitrator under the Workmen's Compensation Act, 1906. (1)

On April 13, 1910, Florence Magdalene Eley, then only thirteen years of age, was working as a match-box filler for Messrs. S. J. Moreland & Sons, when she met with an accident which injured her right hand to such an extent that it became useless. Liability was admitted, and the employers paid her her full wages, 5*s*. 5*d*. a week, as compensation. In December, 1911, an agreement was entered into and recorded whereby she undertook light employment with the employers at 3*s*. a week and the compensation was reduced to 2*s*. 5*d*. On March 1, 1912, she was dismissed from her employment, and compensation continued to be paid at 2*s*. 5*d*. In March, 1912,

(1) Sched. 1., par. 16 : "Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act :

"Provided that where the workman was at the date of the accident under twenty-one years of age and the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding fifty per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding one pound."

Par. 17 : "Where any weekly payment has been continued for not less than six months, the liability therefor may, on application by or on behalf of the employer, be redeemed by the payment of a lump sum of such an amount as, where the incapacity is permanent, would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity for the workman equal to seventy-five per cent. of the annual value of the weekly payment, and as in any other case may be settled by arbitration under this Act, and such lump sum may be ordered by the committee or arbitrator or judge of the county court to be invested or otherwise applied for the benefit of the person entitled thereto : Provided that nothing in this paragraph shall be construed as preventing agreements being made for the redemption of a weekly payment by a lump sum."

the employers applied for redemption. The request for arbitration was left with the Court for service in the usual way, but was not sent till April 10, when it was despatched by registered post to the infant; but it was addressed to her at 72 instead of 78, Sweetbriar Street, Gloucester, so that it was not delivered till Sunday, April 11.

On April 19, 1915, the infant applied by her father and next friend for an increase of the weekly compensation. On May 10 both the applications for redemption and review came before the learned judge. The application to redeem came first, and, when it was called on, a solicitor, who said that the infant was not before the Court, took the objection that the request had not been served, and that she had no guardian and that the order for redemption could not be made. The employers contended that service was unnecessary and refused an adjournment, and the learned judge made awards refusing the application for redemption and directing that the compensation should be increased to 5*s.* 6*d.* a week (the figure agreed to by the parties), the costs of both applications to be paid by the employers.

The employers appealed on the grounds that in *Eley* v. *Moreland & Sons* the county court judge was wrong in law in entertaining the infant's application for and in awarding an increase in the weekly payments: the judge awarded an increase in the weekly payments after having refused to hear on its merits an application by the respondents for redemption of the weekly payments: service of the request for the redemption was effected by the Court by post in a registered letter; the registered letter was delivered on a Sunday, and on that ground the judge dismissed the application for redemption with costs: the exercise of the judicial discretion vested in the judge as to whether or not he should in the circumstances hear on its merits the application to redeem did not empower him to dismiss the said application to redeem; he was wrong in law in so doing and in proceeding to hear the applicant's application for a review and in making an award for an increase in the weekly payments: and in *Moreland & Sons* v. *Eley* the employers appealed on the ground that the county court judge was wrong in law in holding that in the exercise of the judicial discretion vested in him as to whether or not he should hear on its merits the respondents' application to redeem the weekly payments

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he had power to dismiss the said application and in dismissing the said application on the ground that the registered letter by means of which service of the request for redemption was effected by the Court was delivered by post on a Sunday.

W. Shakespeare, for the employers.

Lort-Williams, for the claimant, took the preliminary objection that the application for redemption had not been properly served and was rightly dismissed; the costs were within the discretion of the judge, and the appeal ought to have been to the Divisional Court. [He referred to s. 131 of the County Courts Act, 1888; Order LIV., r. 24, of the County Court Rules, 1903—1914; *Welland* v. *Great Western Ry. Co.* (1); *Howarth* v. *Sir B. Samuelson & Co.* (2); and *Panagotis* v. *Owners of S.S. Pontiac.* (3)]

The COURT held that the defect in service had been waived by the appearance of the claimant, that the county court judge had jurisdiction and had exercised his discretion properly, and that the objection failed.

W. Shakespeare, for the employers. It may be admitted that the learned judge has power to arrange his list as he pleases and take the cases in any order he likes; but not so as to deprive the appellants of their rights. It was not necessary to appoint a guardian; the judge might have directed under r. 7, sub-r. 2, of the Workmen's Compensation Rules, 1913—1914, that the infant should appear as if she were of full age. The employers have an absolute right to redeem, and the judge had no right to take the infant's application before that of the appellants so as to take away their right: *Marshall, Sons & Co.* v. *Prince* (4); *Kendall & Gent* v. *Pennington.* (5)

[LORD COZENS-HARDY M.R. referred to *Calico Printers' Association* v. *Higham.* (6)]

The county court judge has acted in this way merely in order to evade the operation of the Act without regard to the rights of the employers. This is not a judicial exercise of his discretion, but

(1) (1900) 2 W. C. & Ins. 144.
(2) (1911) 104 L. T. 907.
(3) [1912] 1 K. B. 74.
(4) [1914] 3 K. B. 1047.
(5) (1912) 5 B. W. C. C. 335.
(6) [1912] 1 K. B. 93.

an attempt to prevent a suggested injustice to the claimant. Service was effected under r. 16 of the Workmen's Compensation Rules of 1913—1914.

[BANKES, L.J. It is too late for the infant to object to any irregularity of service: *Harris* v. *Taylor*. (1)]

Where the procedure is not otherwise provided for, that of the county courts is to be followed: r. 96 of the Rules of 1913—1914. Under Order LIV., r. 19, of the County Court Rules, 1903—1914, it is no doubt irregular to serve process on Sunday. An application ought to have been made under Order LIV., rr. 24 and 25, to set aside the proceedings. This point was expressly omitted from the judgment in *Marshall, Sons & Co.* v. *Prince*. (2) Both appeals should be allowed, and the application for redemption should be sent back to the judge to be heard on a proper basis.

Lort-Williams, for the claimant. The application cannot be sent back with instructions to make an order for redemption, for there is no finding of permanent incapacity. The judge was right under r. 88 of the Rules of 1913—1914. The point no doubt is technical, but that is justifiable, for it is admitted that to fix the wages at 2*s*. 5*d*. is grossly unfair to the infant. The point of the irregularity of service was sufficiently raised in the Court below: *Abrahams* v. *Dimmock*. (3) It could not be cured by appearance, for the respondent was an infant, and the solicitor who appeared stated that he did not represent her. She could only appear by her guardian.

[He was stopped by the Court.]

LORD COZENS-HARDY M.R. This is an appeal from two decisions of the learned county court judge. I do not propose to say anything about the preliminary objections which have been taken. They have been sufficiently dealt with in the observations during the hearing; at all events, I am in favour of Mr. Shakespeare's contention on the preliminary objections. I will, therefore, proceed to consider the case as though there had been no irregularity in the service, nor any irregularity in the other proceedings.

The question is, what are the rights of the parties having regard to two very difficult paragraphs of the Workmen's Compensation

(1) [1915] 2 K. B. 580. (2) [1912] 1 K. B. 93.
(3) [1915] 1 K. B. 662.

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Act. [His Lordship stated the facts and read Sched. I., pars. 16 and 17, and continued :]

Now what is the position of things ? No order has been made for redemption. An order has been made for review. The order for review is perfectly right unless the commencement of the application to redeem deprives the Court of any jurisdiction to deal with the matter, because the Court ought not to be asked on the same day to make two orders which neutralize each other. Par. 17 has been considered and discussed by this Court more than once, and is, in some respects, a very difficult paragraph. It was discussed by us in *Calico Printers' Association* v. *Higham* (1) and in *Marshall, Sons & Co.* v. *Prince.* (2) I do not think it necessary to say anything more about either of those, except that in *Marshall, Sons & Co.* v. *Prince* (2) the point which is now raised, though not decided, was present to the mind of the Court and it was deliberately left open. That was a case where there had been an application to redeem an award made by the learned county court judge, but made on a wrong basis. The appeal was allowed, and it was sent down for a new trial in order that the learned judge might proceed with the matter on a proper basis. At the end of my judgment I say (3) : " I abstain from considering what may be the result if there should be an application for review by the infant before the matter is reheard." Now, that is exactly the present state of things. Before this matter can be reheard it must go back, of course on our order, to the learned county court judge if it is desired. An application for review has been made, it has been dealt with, and there has been a review. It is now for us to decide what is the effect of that which we abstained from deciding on the other occasion. In my opinion the two applications are in this position, that one application has just as much right to be heard as the other, and as the review has been made, and upon the materials it has been properly made, it is now too late for an application to redeem to proceed with any possibility of success, because the weekly payment has been altered ; 5*s.* 6*d.* a week, and not 2*s.* 5*d.* a week, has been paid since the date when the matter came before the judge. That being so, I see no ground for depriving the infant of the right to take

(1) [1912] 1 K. B. 93. (2) [1914] 3 K. B. 1047.
(3) [1914] 3 K. B. at p. 1053.

advantage of the order made by the learned county court judge under par. 16, and I do not think it is any answer to say that the effect of that order will be to render an application for redemption nugatory. I do not think that the decision which I have arrived at is inconsistent with any of the authorities which have been consulted. It seems to me to be in accordance with good sense, and I think that we should be doing wrong if we said that the effect of an application to redeem necessarily deprived the infant of any right whatever to review. In my view the order made on the application for review was right. The appeal against that ought to be dismissed with costs. In the other case, it being conceded now that the application to redeem is useless, it is not asked that it should go back, and therefore the appeal as to that must also be dismissed with costs.

BANKES L.J. I agree. The main question raised on this appeal is as to the course the learned judge ought to have taken having regard to the fact that the two applications came before him on the same day and at the same Court. Now Mr. Shakespeare contends, and it seems to me he must contend, that the effect of par. 17 is to give him an absolute indefeasible statutory right to have an order for redemption on the footing of the existing facts, assuming, of course, that the learned judge found that the incapacity was permanent. I do not agree with that view. I think that the rights given to the workman under Sched. I., par. 16, and the rights given to the employer under Sched. I., par. 17, are co-equal rights, that neither is greater nor less than the other, and that when the Court has to consider how to give effect to those co-equal rights we must deal with each application and consider whether the applicant has made out a case for the assistance of the Court upon that application. Par. 16 is designed to meet the case of an infant who is injured at the time when his working capacity is small, and therefore his wages are small in amount, and it provides for an application after the lapse of twelve months to ask the Court to review the weekly payment on the footing of the assumed increased capacity of the infant to earn larger wages. That is the right which is conferred upon the infant by the statute, and it is a right which the Court must give effect to when an

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application is made for it. The other right is the right of the employer to redeem the weekly payments. There is nothing in the decisions to which we have been referred which seems to me to cover this particular point and to exclude the consideration by the learned judge of an application by the workman to have his rights enforced. I think that point was expressly left open by the Master of the Rolls in the case of *Marshall, Sons & Co.* v. *Prince.* (1) Under those circumstances it appears to me that the duty of the learned county court judge was to consider and deal with both applications, and it was impossible for him to deal with the application under par. 16 by saying that the employers had also got an application before him under par. 17. He can deal with both applications only by giving the workman such rights as par. 16 confers upon him and then giving the employer such rights as par. 17 confers on him, having regard to a decision properly come to with reference to par. 16. In those circumstances I agree with the Master of the Rolls in the form of order proposed.

WARRINGTON L.J. I agree. On May 10, 1915, two applications were before the learned county court judge; one of them was an application by the employers under par. 17 of the schedule to the Act asking for the redemption of the weekly payments on the footing that, the injury being permanent, they were entitled to redeem by paying on a basis of the 2*s.* 5*d.* which had hitherto been paid. The other application was an application by the workman, in this particular case an infant, for review of the then current weekly payment. By the paragraph under which the application was made, the workman being an infant, a particular criterion which it is unnecessary to read might be applied in fixing the amount of the increased weekly payment; but except in that respect there is no distinction between this case and any other application to review. Now the two applications came before the learned judge, as I have said, on the same day, and I will assume, as I think we are entitled to assume, that both those applications were properly before him and could be both properly dealt with by him. Under those circumstances, what is he to do? He has two rights conferred by the statute, one upon the employers and one

(1) [1914] 3 K. B. 1047.

upon the workman. It seems to me that it was competent to the learned judge to say that he would hear those two applications together. It was impossible for him to give priority, either to the workman's application or to the employers' application. I think he was entitled to hear the two together. Then, hearing the two together and coming to the conclusion upon the workman's application that it was right to increase the weekly payments, it seems to me he was bound to give effect to that, although, by doing so, he might be unable to give effect to the masters' application for redemption. That is what the learned judge has in fact done, because the two awards which have been made are, first, for an increase of the weekly payments in favour of the workman, and second, an award, which, in my opinion, logically follows from the first, namely, dismissing the masters' application for redemption. As to the authorities, the two authorities which have been cited to us do not, in my opinion, touch the present point. It was expressly left open by the Master of the Rolls in *Marshall, Sons & Co.* v. *Prince.* (1) I agree that both appeals ought to be dismissed.

Appeals dismissed.

Solicitors: *E. A. Alexander, for Wellington & Clifford, Gloucester; Willis & Willis, for A. Lionel Lane, Gloucester.*

(1) [1914] 3 K. B. 1047.

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[IN THE COURT OF APPEAL.]

WHENMAN, APPELLANT *v.* CLARK, RESPONDENT.

Rates—Non-payment of—Application to enforce Rate—Jurisdiction of Justices to hear and determine Defences—Exemption—"Parochial Rates"—General District Rate—Thames Conservancy Act, 1894 (57 *&* 58 *Vict. c. clxxxvii.*), *s.* 289—*Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 211, 256.

By s. 289 of the Thames Conservancy Act, 1894, all lands and buildings "vested in the conservators in respect of the Thames above London Bridge shall be exempt from all parochial charges, rates, taxes, assessments, impositions and payments whatsoever."

A house and grounds, which were vested in the conservators, were let by them at a rent to a tenant who was not one of their officials. The house and grounds were not used for any purpose in connection with the navigation or conservancy of the Thames. The tenant was assessed to the poor rate and general district rate in respect of the house and grounds. Upon a summons before justices for an order for payment of the rates :—

Held, (1.) that the house and grounds were exempt from the poor rate ; (2.) that though the exemption in s. 289 did not in itself extend to the general district rate, which was not a parochial rate, yet, inasmuch as by s. 211, sub-s. 1, of the Public Health Act, 1875, the general district rate was to be made and levied on the occupier of property "for the time being by law assessable to any rate for the relief of the poor," it necessarily followed from the exemption in respect of the poor rate that the house and grounds were also exempt from the general district rate.

Upon an application to a Court of summary jurisdiction for an order for payment of a general district rate under s. 256 of the Public Health Act, 1875, the Court has jurisdiction to entertain the question whether the occupier is exempt under the provisions of a public Act from being rated, the facts not being in dispute.

Dictum of Bowen L.J. in *Reg.* v. *Hannam* (1886) 34 W. R. 355 approved and followed.

Per Swinfen Eady and Pickford L.JJ. : Upon such an application the justices have jurisdiction to hear and determine any defence alleging that the defendant ought not to have been rated at all, or that, if he was rateable at all, he ought not to have been rated upon the full rateable value, when the material facts are not in dispute.

Decision of the Divisional Court [1915] 1 K. B. 548 varied.

APPEAL from the decision of a Divisional Court upon a case stated by justices of Middlesex ; reported [1915] 1 K. B. 548.

A complaint was preferred by Cecil Whenman, the appellant (1), an assistant overseer of the poor for the parish of Hampton Wick and collector of the general district rates for the urban district of Hampton Wick, against Matthew Clark, the respondent, for non-payment of two sums of 3*l.* 18*s.* 10*d.* and 2*l.* 10*s.* 2*d.* alleged to be due from him for poor rate and general district rate respectively made on October 20, 1913. The justices refused to make an order for the payment of either of the said rates and dismissed the complaint subject to the following case :—

1. The said rates were duly made and demanded of the respondent.

2. The respondent is and was at all material times the occupier of a house and grounds known as " The Wilderness " in the parish of Hampton Wick, and the said rates were assessed upon him as such occupier.

3. When the facts above stated had been proved by the appellant and whilst the appellant was still in the witness-box counsel for the respondent cross-examined the appellant and asked him if he had not received in answer to the demand note for the said rates two letters, one from the respondent dated November 3, 1913, and one from the solicitor to the conservators of the river Thames dated November 4, 1913, in which letters it was claimed that the said house and grounds were the property of and were vested in the conservators, and that by virtue of the provisions of s. 289 of the Thames Conservancy Act, 1894, the said house and grounds were exempt from the said rates, and the respondent was exempt from paying the rates as the occupier thereof. The appellant admitted that he had received the said letters and produced them before the justices.

4. Counsel for the appellant thereupon contended that the respondent was not entitled before the justices to rely upon the provisions of the said section upon the ground that they had no jurisdiction in proceedings for the recovery of poor rate or general district rate to inquire whether the said provisions applied so as to exempt the premises and the respondent from the payment of the said rates. Counsel for the respondent contended that the

(1) The terms " appellant " and " respondent " are throughout this report used as signifying the position of the parties in the case stated for the opinion of the High Court.

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justices had such jurisdiction, and that all the evidence which the appellant or the respondent desired to give should be laid before them before they decided the question of jurisdiction.

5. The justices decided to determine the question of jurisdiction before they heard further evidence, and after consideration they were of opinion that they had such jurisdiction and decided to hear further evidence.

6. After they gave the decision in paragraph 5 the following further facts were proved. The said house and grounds are an ordinary private residential house with a garden, and are situate a few yards from the bank of the river Thames and from the towpath upon the said bank, and are also situate at a point about twenty-one miles above London Bridge. The towpath is situate between the river Thames and the said house and grounds. The house and grounds are fenced off from the towpath. The respondent is not and was not at any material time an official of the conservators. The house and grounds are not at present and have not at any material time been used for any purpose in helping the navigation of the river Thames, or for any purpose connected with the conservancy of the river or with any lock or towpath or other works of the conservators. The house and grounds were transferred, and are included in the records handed over, to the conservators by the mayor, commonalty, and citizens of the city of London in 1857 pursuant to s. 135 of the Thames Conservancy Act, 1857. The conservators have continued to hold the premises and have received rent therefor ever since the year 1857. The rent is carried to the account of the conservators relating to the navigation of the river Thames above London Bridge and is and has been used and applied by the conservators for one or other purpose of the navigation of the said river. The lease under which the respondent holds the house and grounds was granted to him by the conservators on June 20, 1913. The occupiers of the house and grounds had been rated in all the rates made for the parish and district from the year 1862 to the making of the rates in question, and there was no record of any previous refusal to pay such rates. No rates have been paid in respect of the house and grounds by the conservators, who have never been the occupiers of the premises.

7. The material portions of s. 289 of the Thames Conservancy

Act, 1894, are as follows: "Notwithstanding anything in any Act and notwithstanding any custom to the contrary all tolls which for the time being may be demanded and received by the conservators under this Act in respect of the Thames above London Bridge, and all lands buildings locks pounds towpaths bridges ferries and works for the time being vested in the conservators in respect of the Thames above London Bridge shall be exempt from all parochial charges rates taxes assessments impositions and payments whatsoever, save as hereinafter in this section mentioned, and all such tolls lands buildings locks pounds towpaths bridges ferries and works in respect of the Thames above the city stone above Staines Bridge shall be also exempt from all parliamentary rates, taxes, assessments and payments whatsoever."

8. For the appellant it was contended that the house and grounds were not lands or buildings "for the time being vested in the conservators in respect of the Thames above London Bridge" within the meaning of the said enactment, and that the said enactment did not exempt the respondent from payment of the said rates or either of them. For the respondent it was contended that the said house and grounds were lands and buildings for the time being vested in the conservators in respect of the Thames above London Bridge within the meaning of the said enactment, and that by reason thereof the said house and grounds were exempt from all parochial charges, rates, taxes, assessments, impositions, and payments whatsoever, including therein the rates demanded by the appellant, and that the respondent was therefore exempted from payment of the said rates.

The questions for the opinion of Court were:

(1.) Whether in proceedings for the recovery of the said poor rate the justices had jurisdiction to take into consideration the provisions of s. 289 of the Thames Conservancy Act, 1894, and to inquire whether those provisions applied so as to exempt the said house and grounds from the said poor rate and the respondent from paying the said poor rate in respect thereof.

(2.) Whether in proceedings for the recovery of the said general district rate the justices had jurisdiction to take into consideration the provisions of the said section and to inquire whether those provisions applied so as to exempt the said house and grounds

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from the said general district rate and the respondent from paying the said general district rate in respect thereof.

(3.) Whether, assuming that the justices had such jurisdiction, they were entitled to refuse to make an order for the payment of either of the said rates.

In the Divisional Court Bray and Atkin JJ., Avory J. dissenting, held that upon the hearing of an application to enforce payment of rates justices had jurisdiction to determine any defence alleging either that the defendant ought not to have been rated at all, or that, if he was rateable, he ought not to have been rated upon the full rateable value; and they might entertain such a defence whether the facts necessary to establish it were undisputed or not. They accordingly answered questions 1 and 2 in the affirmative. They also held that the premises in question were "vested in the conservators in respect of the Thames" within the meaning of s. 289 of the Thames Conservancy Act, 1894, though they were not used by them for the purposes of the navigation of the Thames, and that therefore the exemption applied and the premises were exempt from parochial charges, including the poor rate. It was also held by the whole Court that the exemption did not extend to the general district rate. (1)

The respondent appealed to the Court of Appeal against so much of the decision as held that the exemption did not apply to the general district rate. (2)

It was admitted in the course of the argument in the Court of Appeal that the entry in the rate-book described the Thames Conservators as the owners and the respondent as the occupier of the premises in question.

McCall, K.C., and *C. B. Marriott*, for the respondent, Clark. The Divisional Court have held that the exemption from parochial charges, rates, &c., in s. 289 of the Thames Conservancy Act, 1894, applies to the poor rate. There is no appeal from that part of the decision, and therefore it must be taken that the premises in question

(1) [1915] 1 K. B. 548.

(2) It was stated that the appellant did not appeal against the decision of the Divisional Court so far as it related to the poor rate inasmuch as no appeal lay, the matter of the enforcement of the rate being a "criminal cause or matter" within s. 47 of the Judicature Act, 1873.

are exempt from poor rate. The general district rate is made and levied under ss. 210 and 211 of the Public Health Act, 1875, sub-s. 1 of s. 211 providing that "general district rates shall be made and levied on the occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor." The premises in question are, by reason of the exemption in s. 289 of the Thames Conservancy Act, 1894, not assessable to any rate for the relief of the poor: *Rex* v. *London Gas Light Co.* (1) Therefore they are not assessable to the general district rate. The words "all kinds of property" mean all property which is in fact assessable to any rate for the relief of the poor. Under s. 88 of the Public Health Act, 1848 (11 & 12 Vict. c. 63) (now repealed), which contained similar language to that in s. 211, sub-s. 1, of the Act of 1875, it was held in *Hodgson* v. *Carlisle Local Board* (2) that property could not be assessed to the district rate unless the occupier was liable to be rated in respect thereof to the poor rate. In *Reg.* v. *Barclay* (3) Field J. (at pp. 308, 309) adopted that view of the law as applicable to the Public Health Act, 1875. He said that the basis of liability under the Act of 1875 is "the occupation of property for the time being assessable to the poor rate. The general rule, therefore, is that no one is to be assessable to the general district rate unless he has such an occupation as would render him assessable to the poor rate; *Hodgson* v. *Local Board of Carlisle.*" (2) And in Lumley's Public Health Acts, 8th ed. p. 489, it is said that "property which is exempt from poor or local rates by express statutes will be exempt from the general district rate." Again in *London Corporation* v. *Associated Newspapers* (4) Lord Loreburn said: "I look first at the Act under which they" (the rates) "are said to be charged. It is the County Rates Act, 1852, which provides that justices shall prepare a basis or standard for fair and equal county rates according to the full and fair annual value of the lands, tenements, and hereditaments rateable to the relief of the poor in every parish (s. 2). Justices are then to make a fair and equal rate according to this basis or standard, and according thereto are to assess and tax every parish (s. 21), and are then to issue

(1) (1828) 8 B. & C. 54.
(2) (1857) 8 E. & B. 116.
(3) (1881) 8 Q. B. D. 306; affirmed in C. A., 8 Q. B. D. 486.
(4) [1915] A. C. 674, at pp. 685, 686.

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precepts to the guardians stating the sum charged on each parish, and 'such guardians shall raise the moneys required by such precepts to be paid in like manner as the money required by such guardians for the relief of the poor' (s. 26). If this Act remains undisturbed, then it is clear that no one is charged with this rate except in respect of hereditaments which are rateable to the relief of the poor." Lord Parker (at p. 695) takes the same view of the application of the words "property rateable to the relief of the poor." The premises therefore are not assessable to the general district rate.

Next, if the premises are assessable to the general district rate under s. 211 of the Public Health Act, 1875, they are exempt from that rate by s. 289 of the Thames Conservancy Act, 1894. The former exemptions from rates, &c., were given by s. 20 of 28 Geo. 3, c. 51 (1788) (which applied to the navigation of the Thames between the city stone above Staines Bridge and Cricklade), and s. 19 of 54 Geo. 3, c. ccxxiii. (1814) (which related to the navigation of the Thames westward of London Bridge to the city stone at Staines). These Acts were repealed by the Thames Conservancy Act, 1894, and s. 289 is not a mere re-enactment of the earlier exemptions, but is an amending enactment: *Stewart* v. *Thames Conservators*. (1) The new exemption is wider than the old one. The word "parochial" only qualifies the word "charges," and not the subsequent words. If "parochial" were intended to qualify all the subsequent words, the exemption might have ended at the word "rates." The words "taxes, assessments, impositions and payments whatsoever" would be senseless. The general district rate comes within the exemption, and the decision of the Divisional Court upon this point was wrong. (2)

Ryde, K.C., and *Konstam*, for the appellant, Whenman. In the first place s. 289 of the Thames Conservancy Act, 1894, does not apply to lands or buildings which are in the nature of superfluous lands or buildings and which are not used in connection with the navigation of the river. No doubt this contention involves the

(1) [1908] 1 K. B. 893, at p. 903.

(2) The Port of London Act, 1908 (8 Edw. 7, c. 68), s. 7, transferred the powers and duties of the Thames Conservators in respect of the Thames below the landward limit of the port of London to the Port Authority, but the property in question was above the landward limit of the port.

proposition that the property in question is liable to be assessed to the poor rate and that therefore the decision of the Divisional Court upon this point is wrong. But, though there can be no appeal against the decision of the Divisional Court upon the question of the poor rate and the order upon that cannot be disturbed, the party who is respondent in the Court of Appeal can advance an argument that the property is liable to be assessed to the poor rate in order to support the decision of the Divisional Court upon the question of the general district rate: *Powell* v. *Kempton Park Racecourse Co.* (1); *Parker* v. *Talbot* (2); *Wixon* v. *Thomas* (*No.* 2). (3) It is immaterial that this is sought to be done in the same case, and not by an independent proceeding. That being so, by s. 289 of the Act of 1894 only those tolls, lands, and buildings are exempt from parochial rates and taxes which are "vested in the conservators in respect of the Thames." These words mean that the lands and buildings must be vested in and used by the conservators in respect of the navigation of the Thames. Sect. 20 of 28 Geo. 3, c. 51, exempted tolls, locks, &c., from any rates, taxes, assessments, or payments whatsoever, either parliamentary or parochial, "for or on account of the said navigation," and 54 Geo. 3, c. ccxxiii., s. 19, exempted tolls and all towing paths, lands, houses, buildings, locks, works, tenements, and hereditaments vested in the Corporation as conservators "for the purposes of the said navigation" from all parochial rates, charges, impositions, and assessments whatsoever. Sect. 289 of the Act of 1894 was intended to continue the same exemptions as existed before in connection with the upper and lower river. The words "lands, buildings," occurring as they do in conjunction with "tolls, locks, pounds, towpaths," &c., mean land and buildings used for the purposes of the navigation of the river. There is no reason why land which the conservators sell because they do not want it for the purposes of the navigation should be assessable to the poor rate when in the hands of a private owner, and yet if the Corporation lease the land on either a long or a short lease, it may be at a peppercorn rent, the lessee should not be liable to be rated in respect thereof. The dissenting judgment of Avory J. upon this point is right.

(1) [1899] A. C. 143. (2) [1905] 2 Ch. 643.
(3) [1912] 1 K. B. 690.

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Next, assuming that the exemption applies and that the premises in question are exempt from the poor rate, they are assessable to the general district rate. The word "parochial" in s. 289 of the Thames Conservancy Act, 1894, qualifies all the subsequent words, "charges, rates, taxes, assessments, impositions, and payments whatsoever." If not, "taxes" would include parliamentary taxes, and yet where in the same section it is intended to exempt all such lands, buildings, &c., above the city stone at Staines from parliamentary taxes it is expressly so stated. A general district rate is not a parochial rate: *Richards* v. *Kidderminster Overseers.* (1) Sect. 294 draws a distinction between "parochial" and "other general and local rates." The fact that the property is exempt from the poor rate does not show that it is necessarily exempt from the general district rate under s. 211, sub-s. 1, of the Public Health Act, 1875. The property is a "kind of property for the time being by law assessable to any rate for the relief of the poor." Those words refer to the nature of the property, not to the nature of the occupation. The decision in *Hodgson* v. *Carlisle Local Board* (2) was that the occupation was such as to exempt the property from the poor rate. There the buildings were used solely for the purpose of holding the assizes, quarter sessions, and public meetings of justices. They were therefore exempt as being occupied on behalf of the Crown. The decision is approved on this ground by Blackburn J. when advising the House of Lords in *Mersey Docks* v. *Cameron.* (3) This latter case decided that to render the property exempt from poor rates the occupation must be by or on behalf of the Crown, thus exploding the supposed rule that an occupier of property for public purposes was not rateable in respect thereof. The dictum of Field J. in *Reg.* v. *Barclay* (4) was in a case which raised the question as to rating the owner to general district rates, and therefore the present point was not in his mind. In *London Corporation* v. *Associated Newspapers* (5) the question was raised as to the exemption of property from the county rate, which was levied as part of the poor rate, and it was held that, as the property

(1) [1896] 2 Ch. 212, at p. 217.
(2) 8 E. & B. 116.
(3) (1864, 1865) 11 H. L. C. 443, at p. 464.
(4) 8 Q. B. D. 306, at pp. 308, 309.
(5) [1915] A. C. 674.

was exempt from poor rate, it was exempt from county rate, which was part of the poor rate. The opinions of the Law Lords must be read in the light of those facts, and is not an authority as regards the general district rate. The decision of the Divisional Court was right upon this point.

The last question is whether the person assessed can take the point that he ought not to have been assessed as a defence to the summons to enforce the rate. The time for appealing against a poor rate has long been subject to conditions. By s. 4 of the Poor Relief Act, 1743 (17 Geo. 2, c. 38), the appeal must be brought "to the next general or quarter sessions of the peace"; and by s. 1 of the Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), the person aggrieved must first apply to the assessment committee for relief. The Legislature has therefore only allowed an appeal upon certain conditions. The effect of allowing the validity of the rate to be questioned upon the application to enforce it would be to repeal the conditions upon which alone an appeal against a poor rate is allowed. So too an appeal against a general district rate must, by s. 269 of the Public Health Act, 1875, be to the next Court of quarter sessions. *Birmingham Churchwardens* v. *Shaw* (1) is the leading authority on the point. Upon proceedings to enforce a poor rate the defendant can show that the rating authority had no jurisdiction to make the rate. For instance, he can show that the rate is bad on its face, or that the defendant is not the occupier, or that the premises are not in the parish, or perhaps that he is within an exemption given by the statute which imposes the rate. If the person rated comes within the charging Act he cannot set up an exemption given by another Act as an answer to an application to enforce the rate. An exemption given by the Act creating the charge is really an enactment that the person exempted is not within the charge. Perhaps he may, though it is not necessary to discuss it, show that he occupies on behalf of the Crown, but in that case the exemption is given because the Crown, not being named in the charging Act, is not bound by it, and it is the same as if the Act had said that every occupier except the Crown or a person who occupies on behalf of the Crown shall be rateable. The Court of Queen's Bench in *Reg.* v. *Bradshaw* (2) followed the

(1) (1849) 10 Q. B. 868. (2) (1860) 2 E. & E. 836.

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decision in *Birmingham Churchwardens* v. *Shaw* (1); and the Court of Appeal in *Reg.* v. *Hannam* (2) approved of the decision and applied it to the case of a general district rate made under the Public Health Act, 1875, which, by s. 256, gives power to a Court of summary jurisdiction, "if no sufficient cause for non-payment is shown," to enforce the rate. It is true that Bowen L.J. in *Reg.* v. *Hannam* (2) said: "I desire to reserve a further possible exception, upon which I express no opinion—namely, where the exemption from rating is enacted by a public Act of Parliament of which the whole world has notice, and which the rating authority must or ought to know, and which, as soon as the statute is read, destroys the rateability without throwing any onus upon the occupier of proving anything so as to gain the exemption for his property. I am not sure whether the justices may not, in that case, refuse to enforce the rate." This was only a dictum or doubt thrown out by Bowen L.J., and was not meant as an expression of opinion; and he concurred in the decision of the Court. Nevertheless the Divisional Court in *Dixon* v. *Blackpool and Fleetwood Tramroad Co.* (3) and in *Wixon* v. *Thomas* (4) treated it as laying down a principle, and for the first time introduced the rule, as stated by Lord Alverstone C.J. in the latter case (5), that "if on the admitted or undisputed facts either the premises in question or the name of the alleged occupier ought not to appear in the rate-book, that point may be taken in answer to an application for a warrant." That is not a correct statement of the law, and ought not to be followed. The admissibility of the defence cannot depend upon whether the rating authority admits or disputes the facts. It is an unsound distinction, because the fact that the person rated is not the occupier or that the justices did not sign the rate has to be proved, and yet it is well established that those defences are available upon application to enforce the rate. Therefore the test cannot be whether the facts are admitted or disputed. It was only a dictum not necessary for the decision. These two cases of *Dixon* v. *Blackpool and Fleetwood Tramroad Co.* (3) and *Wixon* v. *Thomas* (4) are the only cases which have enlarged the rule laid down in

(1) 10 Q. B. 868.
(2) 34 W. R. 355.
(3) [1909] 1 K. B. 860.
(4) [1911] 1 K. B. 43.
(5) Ibid. at p. 53.

Birmingham Churchwardens v. *Shaw* (1) and approved by the Court of Appeal in *Reg.* v. *Hannam.* (2) The dissenting judgment of Bigham J. in *Dixon's Case* (3) states the true rule and ought to be followed. That rule was stated by Channell J. in *Westminster Corporation* v. *Army and Navy Auxiliary Co-operative Supply.* (4)

[SWINFEN EADY L.J. referred to *Rayner* v. *Drewitt.* (5)]

The question in that case was one of Crown exemption, and the observations of the judges must be read in that light. *Sheffield Waterworks Co.* v. *Sheffield Corporation* (6) was a case where the rate was bad on its face, and in *Reg.* v. *Thornton* (7) the wrong person was rated, namely, the owner and not the occupiers. There has been a uniform settled practice until it was disturbed in 1909 by *Dixon* v. *Blackpool and Fleetwood Tramroad Co.* (3), and the Courts will not in such a case as this interfere with a long course of practice supported by decisions not of recent date: *London County Council* v. *Erith Churchwardens* (8); *Reg.* v. *London Justices.* (9) This point is not a mere technical point; it has substance in it. The time for appealing against a rate is limited, and after that time has expired the local authority ought then to be in a position to know how much a rate will produce and to make their financial estimates accordingly. If the practice laid down in *Birmingham Churchwardens* v. *Shaw* (1) were not followed, and if liability to pay the rate could be disputed upon a summons to enforce payment of it, the local authority might have to make a new rate to make up the deficiency, and new occupiers might have to pay instead of those who were occupiers at the time when the original rate was made, thus involving inconvenience to the local authority and injustice to the ratepayers. The dissenting judgment of Avory J. upon this point is correct. [*Reg.* v. *Mayor of London* (10) was also referred to.]

McCall, K.C., in reply. The decision of the Divisional Court upon the question of the liability of the respondent to pay the poor rate is binding on this Court. The question as to the liability to pay

(1) 10 Q. B. D. 868.
(2) 34 W. R. 355.
(3) [1909] 1 K. B. 860.
(4) [1902] 2 K. B. 125, at pp. 133, 134.
(5) (1900) 82 L. T. 718.
(6) (1885) 55 L. J. (M.C.) 40.
(7) (1892) 8 Times L. R. 555.
(8) [1893] A. C. 562, at p. 599.
(9) (1846) 9 Q. B. 41, at p. 43.
(10) (1887) 52 J. P. 70.

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the poor rate and general district rate arises between the same parties, on the same summons, and on the same valuation list, and the appellant is estopped from alleging that the decision as to the poor rate is wrong: see Smith's L. C., 12th ed., vol. 2, p. 777. If, however, the point is open to the appellant, the Divisional Court were right in holding that the premises in question were "vested in the conservators in respect of the Thames." The exemption given by s. 19 of 54 Geo. 3, c. ccxxiii., of lands, &c., vested in the conservators "for the purposes of the said navigation" is deliberately altered in s. 289 of the Thames Conservancy Act, 1894, and the words are now larger and include the premises in question.

With regard to the procedure point, the appellant put in the valuation list before the justices, on the face of which it appeared that the Thames Conservators were the owners of the house and land in question. There were no facts necessary to be proved. There remained only the construction of the exemption clause of the Act. The cases upon which reliance was placed on behalf of the respondent in the Divisional Court have already been referred to, and there are only three cases to which it is necessary to refer. The language of Bigham J. in *Rayner* v. *Drewitt* (1) is exactly in point here: "If he" (the person rated) "could have shown that the building was wholly exempt from rates either by common law or by statute the justices would have been bound to refuse to issue their warrant for the payment of the rates." The judgment of the same learned judge in *Dixon* v. *Blackpool and Fleetwood Tramroad Co.* (2) is, no doubt, inconsistent with his judgment in *Rayner* v. *Drewitt* (1); but in the later case he does not deal with *Rayner* v. *Drewitt* (1), and his judgment in the earlier case and the judgments of Lord Alverstone C.J. and Walton J. in *Dixon's Case* (2) are to be preferred. The necessary result of *Dixon's Case* (2) and of *Wixon* v. *Thomas* (3) is that if there is evidence of facts, necessary to bring the person rated within the exemption, which facts are either admitted or uncontradicted, that is enough to give the justices jurisdiction. The Thames Conservancy Act, 1894, is a public Act: s. 9 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63); and therefore the

(1) 82 L. T. 718. (2) [1909] 1 K. B. 860.
(3) [1911] 1 K. B. 43.

reservation by Bowen L.J. in *Reg.* v. *Hannam* (1) at the end of his judgment applies to it. No such question arose in the present case as arose in *Birmingham Churchwardens* v. *Shaw* (2), namely, as to whether the conditions precedent in the Act to the exemption applying had been proved. The only question here was as to the construction of the exempting section of the Act. "Sufficient cause for non-payment is shown" within s. 256 of the Public Health Act, 1875. The Divisional Court were right upon this point.

Cur. adv. vult.

Nov. 23. The following judgments were read:—

SWINFEN EADY L.J. The respondent, Matthew Clark, who appeals to this Court, seeks to establish that he ought not to be ordered to pay 2*l.* 10*s.* 2*d.*, the amount with which it is sought to charge him in respect of a general district rate for the urban district of Hampton Wick. The facts are fully set out in the case stated, and need not be repeated.

The first question is whether the house and grounds occupied by the respondent are included in the property exempted from parochial charges, rates, taxes, &c., by s. 289 of the Thames Conservancy Act, 1894. The section provides: [The Lord Justice read the section set out above.] There is no dispute whatever between the parties as to the facts. The respondent's house and grounds are vested in the conservators in respect of the Thames above London Bridge, and so are directly within the language of the exemption. The house is not occupied by a lock-keeper or other officer of the conservators, and is not directly used for the purposes of the undertaking, but it is let to a tenant, and by s. 240 of the Act the rent is to be carried to the credit of "the lower navigation fund," which is to be dealt with as provided by s. 287 in carrying into execution the purposes of the Act. It was urged that the exemption was only intended to extend to lands and buildings if and so long as the same were being used directly for the purposes of the undertaking, but there is no such qualification contained in s. 289, and it is not the natural meaning of the language used, and such a construction is only possible by reading into the section words which are not

(1) 34 W. R. 355. (2) 10 Q. B. 868.

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there. No good purpose is served by comparing the language of the Act of 1894 with that of the Act of 1814. It is the 1894 Act alone which has to be construed. The Court is not entitled to travel out of the case and assume that no part of the land and buildings in question has ever been used for any purpose connected with the navigation, nor that the hereditaments were purchased under compulsion, nor that more was purchased than was required because the owner refused to sell a part. None of these matters are so stated in the case. The construction of s. 289 at which I have arrived gives full effect to the words " in respect of the Thames." The two provisions of s. 289 distinguish between hereditaments vested in the conservators " in respect of the Thames above London Bridge " and such of them as are also vested in the conservators " in respect of the Thames above the city stone above Staines Bridge." To these latter hereditaments an additional exemption in respect of parliamentary rates and taxes is granted. The words " in respect of the Thames " are part of the topographical description of the portion of the undertaking to which reference is being made. In my opinion the majority of the Divisional Court were right in coming to the conclusion that these lands and hereditaments were within the exemption contained in s. 289, and were therefore exempted from poor rate.

The next question is whether the exemption extends to the general district rate. This rate is not a parochial charge, rate, or tax. The urban district may comprise more than one parish, and also parts of parishes. Its district is not necessarily co-terminous with the boundaries of any parish. This rate is not included under the words " parochial charges rates taxes." Moreover another section in the same Act (s. 294) draws a distinction between " parochial " and " other . . . . local taxes rates," &c. Although not in terms exempted, the further question arises whether the exemption does not follow necessarily from being exempted from poor rate, or, in other words, whether the respondent can be charged with the general district rate seeing that it has been decided that he is not liable to be charged as occupier to the poor rate. It was decided in *Hodgson* v. *Carlisle Local Board* (1) that real property within the district of a local board of health cannot be assessed to

(1) 8 E. & B. 116.

a district rate unless there be some person having such an occupation as would make him liable to the poor rate in respect thereof. That case was decided under s. 88 of the Public Health Act, 1848, which is in the same terms as s. 211 of the Public Health Act, 1875. Again, in *Reg.* v. *Barclay* (1), which arose under s. 211 of the Public Health Act, 1875, it was decided that, the basis of liability under this Act being the occupation of property for the time being assessable to the poor rate, the general rule is that no one is to be assessable to the general district rate unless he has such an occupation as would render him assessable to the poor rate. And in *London Corporation* v. *Associated Newspapers* (2) it was held by the House of Lords that certain hereditaments which were not "rateable to the relief of the poor" were as a necessary consequence exempted from county contributions levied by means of county rates made under the County Rates Act, 1852, upon the basis of the annual value of the "hereditaments rateable to the relief of the poor in every parish."

In my judgment the fact that the respondent is not rateable to the relief of the poor as occupier of the premises in question exempts him from being charged to the general district rate.

There remains the third question, whether the justices had jurisdiction to determine the validity of the claim to exemption on the application for an order for payment. By s. 256 of the Public Health Act, 1875, which deals with summary proceedings for the recovery of rates made under the Act, it is provided that a Court of summary jurisdiction may make an order for payment of the rate in arrear "if no sufficient cause for non-payment is shown." Apart from authority, if a person summoned for a rate shows that he is not a person liable to be rated as occupier, and therefore that he is not liable to pay the rate in question, he would appear to show sufficient cause for non-payment. But it has been urged that a line of authorities has given a restricted meaning to the words I have quoted from s. 256, and that on a summons for non-payment of poor rate the justices have only jurisdiction to consider the objection that the overseers have rated property not within the parish or a person not the occupier. In support of this contention reliance was placed principally upon *Birmingham Churchwardens*

(1) 8 Q. B. D. 306. (2) [1915] A. C. 674.

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v. *Shaw*. (1) Upon principle I see no reason why a person who is exempted by a public statute from being rated in respect of his occupation of certain premises should not be at liberty to rely upon the terms of the statute when summoned before justices. Indeed, in *Reg.* v. *Hannam* (2) Bowen L.J. said: "I desire to reserve a further possible exception, upon which I express no opinion—namely, where the exemption from rating is enacted by a public Act of Parliament of which the whole world has notice, and which the rating authority must or ought to know, and which, as soon as the statute is read, destroys the rateability without throwing any onus upon the occupier of proving anything so as to gain the exemption for his property. I am not sure whether the justices may not in that case refuse to enforce the rate. I desire to reserve my opinion upon it." The effect of s. 9 of the Interpretation Act, 1889, is that the Thames Conservancy Act, 1894, is a public Act, and is to be judicially noticed as such as the contrary is not expressly provided by the Act. It was pointed out by Lord Alverstone in *Dixon* v. *Blackpool and Fleetwood Tramroad Co.* (3) that the words in s. 256 of the Public Health Act, 1875, which I have before quoted, were not contained in some of the statutes under which, in the cases there referred to, rates were sought to be enforced, and he added that it could not be denied that such words conferred some additional powers on justices to whom the application is made, having regard to some of the later cases to which he called attention. And in *Wixon* v. *Thomas* (4) the same learned judge said: "It is impossible at the present day to apply in all its strictness the old rule that justices are not entitled to entertain, on an application for a warrant, any matter which might be raised on an appeal," and added "that the ambit of matters which the justices may consider on an application for a distress warrant has been enlarged." Thus it is not accurate to say that at the present time the only objections open to the justices to consider are whether the lands rated are situate within the parish and whether the person rated is in fact the occupier.

In *Rayner* v. *Drewitt* (5) Bigham J. said: "If he" (the person rated) "could have shown that the building was wholly exempt

(1) 10 Q. B. 868.
(2) 34 W. R. 355.
(3) [1909] 1 K.B. at pp. 871, 872.
(4) [1911] 1 K. B. at p. 53.
(5) 82 L. T. 718.

from rates either by common law or by statute, the justices would have been bound to refuse to issue their warrant for the payment of the rates." In *Dixon* v. *Blackpool and Fleetwood Tramroad Co.* (1) it was decided that a tramroad company, liable to be assessed at one fourth only of the value of a tramroad, could raise as an objection before the justices that it had been rated at the full value and that the justices had jurisdiction to refuse to issue their warrant for the full amount. And in *Wixon* v. *Thomas* (2), before referred to, the Divisional Court held that the justices ought to have refused to issue a distress warrant when the person rated as occupier proved that the premises were occupied by servants of the Crown for the purposes of the Crown. The rule was laid down by Bray and Atkin JJ. in the Divisional Court in the following terms (3): "that the justices have jurisdiction if the question is whether the defendant ought to have been rated at all, or, if at all, for the full rateable value." In my opinion this is a good working rule, and ought to be followed, where the material facts are not really in dispute. Although the rule may restrict the operation of the general words used in s. 256 of the Public Health Act, 1875—"if no sufficient cause for non-payment is shown"—it nevertheless interprets the words upon the lines of various decided cases and still leaves to be dealt with by way of appeal those questions which ought properly only to be raised in that way.

For these reasons I am of opinion that the appeal of Matthew Clark should be allowed, and that all the three questions should be answered in the affirmative, and as regards question 3 as well with regard to the general district rate as the poor rate.

PHILLIMORE L.J. This is an appeal from a Divisional Court and raises the question of the liability of land at Hampton Wick owned by the conservators of the river Thames to the general district rate. Whenman, the collector, summoned Clark, an occupier of a house owned by the conservators, to show cause why a distress warrant should not issue for poor rate and district rate. The magistrates refused the summons, but stated a case. Before the Divisional Court the point was raised whether the magistrates had any power

(1) [1909] 1 K. B. 860. (2) [1911] 1 K. B. 43.
(3) [1915] 1 K. B. at p. 559.

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to consider and adjudicate upon the exemption claimed by the occupier. The Divisional Court by a majority, Bray and Atkin JJ., held that the magistrates had power to adjudicate upon the claim and that the house was not liable to the poor rate. Avory J. held both that the magistrates had not power and that if it was for them they should have held the occupier liable. All three judges agreed that the occupier was liable to the district rate. From the decision of non-liability to the poor rate there could be no appeal. The occupier appeals from the decision that he is liable to the district rate.

Sect. 289 of the Thames Conservancy Act, 1894, which is the material section, has already been read by the Lord Justice. This house is at Hampton Wick and prima facie vested in the conservators in respect of the Thames above London Bridge but not above Staines Bridge. It would therefore seem that it was exempt from all parochial rates, &c., but not from parliamentary taxes. But it was said, and this was the argument which had force with Avory J., that it is not all land vested in the conservators which is so exempt, but only lands vested in them in respect of the Thames, and that this means the same thing as " vested or used for the purposes of the navigation " or " purchased or used by the conservators for the purposes of the Act," and that this house, not being occupied by any servant of the conservators, but being occupied by an inhabitant paying rent to the conservancy, was not vested in the conservators in respect of the Thames or for the purposes of the navigation or purchased or used for the purposes of the Act. But on completing the phrase it will be seen that these words " in respect of the Thames " have only a topographical meaning.

At the time of the passing of the Act of 1894 (and ever since till the Port of London Act, 1908) the conservancy of the whole river from Yantlet Creek was vested in the conservators of the river Thames. It does not seem to have been intended by the Act of 1894 to give any exemption from rates or taxes of tolls or land vested in respect of the Thames below London Bridge. It was not intended to exempt from parliamentary taxes tolls or land vested in respect of the navigation below the city stone at Staines Bridge. It was intended to exempt from rates and taxes tolls and land vested in respect of the Thames above Staines Bridge. Three

areas had therefore to be marked off; and further there were two separate funds, one for the first and second area combined, the other for the third. The words used seem appropriate for this purpose, and there is no reason to give them any other meaning.

It is true that in an earlier Act of 1814 (54 Geo. 3, c. ccxxiii., s. 19) the exemption had been given when there was only one area in respect of tolls and lands vested in the mayor and commonalty and citizens of the city of London for the purposes of the navigation, and that there was a provision for compensation in s. 23, where the words "purchased or used for the purposes of the Act" occur. But here again there was reason for the limitation. The Corporation of the city of London held many tolls and lands, and it was not intended to free all these tolls and lands from rates, but only those which came to them as conservators. Hence the words of limitation. Till 1866 the up river conservators, from Staines to Cricklade, were a different body. They had their own exemption under 28 Geo. 3, c. 51, s. 20, which presumably extended to taxes as well as rates, "either parliamentary or parochial, or otherwise howsoever"; and after the two conservancies were united the two funds were still kept distinct and remained so till the Act of 1908. Hence, though the matter is not before us as an appealable matter, but only as a stage in the argument on the appealable matter, I conclude that the decision as to the exemption of this house from poor rate was right.

I may add that, even if I took the meaning assigned to these words by Avory J., I should still think that the exemption attached. It might be possible to separate houses and lands owned by the conservators and to say this piece of land is used for a lock or weir or for a yard to store necessary materials and this house for a lock-keeper's house, and these are occupied and used directly in respect of the Thames or for the purposes of the navigation, while a house or field let at a rent which swells the funds is not directly so occupied or used. It only contributes revenue. But the expression is also applied to tolls, and they come in only as revenue.

The next question is whether the district rate is one for which there is exemption. The adjective "parochial" qualifies, I think, all the substantives charge, rate, tax, assessment, &c., and the district rate is not a parochial rate. The district if it is con-

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terminous with the parish is only so accidentally. But regard must be had to the language of s. 211 of the Public Health Act, 1875, and the decisions upon the construction of that section and upon similar words in the earlier Act. The words are as follows: "General district rates shall be made and levied on the occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor. . . . ." The effect of this language has been held to be that only those units of property which are assessable to poor rate are assessable to the district rate. So it was held in *Hodgson* v. *Carlisle Local Board* (1) and in other cases, and, if it is open to us to consider the matter apart from authority, I think rightly so held.

This house therefore, being exempt from poor rate, should be held to be exempt from the district rate.

It remains to consider whether the exemption could be set up as a defence to an application to distrain, or whether the only way of raising it was by appeal ultimately to the quarter sessions. I agree with counsel for the collector that this is not altogether a technical point. To begin with, it would give his client this rate, though he might lose all future ones. It is a point upon which there has been much diversity of judicial opinion.

It is agreed that there are some objections to an assessment which can be relied upon as a defence to a summons, though they could also be raised upon appeal; and it is agreed that there are some objections to an assessment which can be raised only on appeal. The difficulty lies in drawing the dividing line. It is established that the objection that the property assessed is not within the district of the overseers and the objection that the person against whom the distress warrant is sought is not the occupier of the property assessed are objections which can be taken before the justices. On the other hand it is established that no objection can be taken before them that the property is assessed at too high a value. But even so, in cases under the Public Health Act, if the property be one which by statute is to be assessed upon some fraction of its value, and it has been mistakenly assessed upon the totality, that objection can be taken before the justices: *Reg.* v. *Barclay* (2); see the language of Cave J. As to all other cases

(1) 8 E. & B. 116. (2) 8 Q. B. D. 306, at p. 312.

reference is generally made to *Birmingham Churchwardens* v. *Shaw* (1); and it has not been deemed necessary to go further back, though there are earlier authorities. In that case the exemption was claimed under 6 & 7 Vict. c. 36 for a literary society. In order to obtain the exemption it was necessary to prove several details of fact, and the construction of the statute was also in question. The Court of Queen's Bench—a very strong Court—held that this exemption could only be claimed by appeal to quarter sessions, and that it was too late to raise it when application was made to the justices for process. The Court laid stress upon the two reasons I have mentioned; but if the difficulty of construing the statute was more than a mere make-weight that part of the decision has not been followed; perhaps because the facilities for stating a case upon a point of law when a matter is before justices in petty sessions have increased since the date of that case. The other objection that facts had to be proved can be traced in subsequent cases: see amongst others *Reg.* v. *Bradshaw* (2), *Reg.* v. *Hannam* (3), *Westminster Corporation* v. *Army and Navy Auxiliary Co-operative Supply* (4), and the dicta in the cases I am about to cite.

It was suggested before us that where the exemption is in the same statute as the assessment the defence could be raised before the justices, but that if an independent statute had to be invoked it could not. There seems no principle in this suggestion. In *Reg.* v. *Hannam* (3) Bowen L.J. made the following reservation: "I desire to reserve a further possible exception, upon which I express no opinion—namely, where the exemption from rating is enacted by a public Act of Parliament of which the whole world has notice, and which the rating authority must or ought to know, and which, as soon as the statute is read, destroys the rateability without throwing any onus upon the occupier of proving anything so as to gain the exemption for his property. I am not sure whether the justices may not, in that case, refuse to enforce the rate. I desire to reserve my opinion upon it." This in a subsequent case has been treated as his ruling, but it was merely reservation of his opinion. In the cases of *Dixon* v. *Blackpool*

(1) 10 Q. B. 868.
(2) 2 E. & E. 836.
(3) 34 W. R. 355.
(4) [1902] 2 K. B. 125.

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and Fleetwood Tramroad Co. (1) and *Wixon* v. *Thomas* (2) Lord Alverstone C.J. seems to hold the view that if the facts are not in dispute and it is a mere question of law the point can be taken before the justices; and the same view is expressed in the former of the two cases by Walton J. (at p. 879). I think it as well to quote the passage: "Now, that being the admission before the justices, it seems to me that they were not called upon to try any question; they were only asked to take into consideration and apply the law of which they were bound to take notice. Upon every application to justices for a distress warrant they must necessarily take into consideration the law relating to the subject-matter with which they are dealing; and here the justices were only called upon to do that which they must have done if the fact which the appellant admitted had appeared upon the face of the rate-book. In my opinion, where upon the facts admitted by the parties before the justices it appears by mere reference to the law, without making further inquiry, that the rate is bad, the justices have jurisdiction to refuse to issue the distress warrant." In the latter case (3) Lord Alverstone says: "If on the admitted and undisputed facts before the justices it follows as a matter of law that the name of the person rated or that of the property in respect of which he is rated ought never to have been inserted in the rate-book, the justices are not bound to issue a distress warrant, the overseers in such a case having acted without jurisdiction. But if some fact has yet to be determined before it can be said that the name of the person rated or the property ought not to have been inserted in the rate-book, the question must then be determined on an appeal, and not on an application for a distress warrant."

From this maze of decisions I think that the following conclusions may be drawn. The two objections that the property assessed is not within the district and that the person sought to be assessed is not the occupier stand by themselves. They raise questions of fact, but questions going to the root of the power of the overseers and of the jurisdiction of the justices. They are objections that the conditions precedent to the exercise of their power by the overseers and of the jurisdiction of quarter sessions on appeal are wanting;

(1) [1909] 1 K. B. 860. (2) [1911] 1 K. B. 43.
(3) [1911] 1 K. B. at pp. 52, 53.

and as to conditions precedent to the exercise of its jurisdiction no tribunal can give itself jurisdiction by wrong findings of fact. It is easy to see this as to the first, not so easy as to the second defence. But, whether easy to understand or not, the principle is established.

As to all other objections, if they are objections of law, such as that in *Reg.* v. *Barclay* (1) or that stated by Bigham J. in *Rayner* v. *Drewitt* (2), they can be raised at any rate nowadays before the justices, who can always be required to state a case. They are not objections to the jurisdiction. But it matters not. The justices must decide according to law. If there is no dispute of fact the objection is one of law. If there is a dispute of fact, not being a fact which is a condition precedent to the exercise of jurisdiction, the defence cannot be raised before the justices, because it might be raised, or more properly in the legal order of events might have been previously raised, on appeal. Whether actually raised or only capable of being raised it is the same according to the judgment in the *Birmingham Case.* (3) If it could be raised before the justices it could be raised (I think, though there is some shadowy suggestion of estoppel) notwithstanding a previous appeal and failure; and then conflicting conclusions of fact might be arrived at by two tribunals, the quarter sessions deciding that the property or the occupier was rateable and the justices in petty sessions coming to a different decision and refusing to give effect to the decision of quarter sessions. The distinction as to the facts which are conditions precedent to the exercise of jurisdiction and which can be inquired into in another Court, and facts inquiry into which is within the jurisdiction of the tribunal, as to which its decision must be taken and cannot be re-examined, appears in many cases. Not a bad example is *Reg.* v. *Allen.* (4) I think that the rationale of the decision in the *Birmingham Case* (3) is that the Court refused to re-examine facts already actually or notionally decided by the Court of quarter sessions, and that thus I can reconcile that case, *Bradshaw's Case* (5), the *Westminster Case* (6), and the decision in *Reg.* v. *Hannam* (7) on the one hand, with the reservation made by

(1) 8 Q. B. D. 306.
(2) 82 L. T. 718.
(3) 10 Q. B. 868.
(4) (1866) 7 B. & S. 902.
(5) 2 E. & E. 836.
(6) [1902] 2 K. B. 12[illegible].
(7) 34 W. R. 355.

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Bowen L.J. in that case, and with the decisions in *Dixon's Case* (1) and *Wixon's Case* (2) and the language of Lord Alverstone C.J. and Walton J. already quoted on the other.

In the case before us there might conceivably have been disputes of fact, but there were none. The rate-book and the demand note gave all the materials.

Applying to these materials the language of the Act of 1894, which is none the less a public Act because it is a local and personal Act, it became matter of law that the occupier could not be required to pay this rate.

I think that the appeal succeeds.

PICKFORD L.J. This was an appeal from a judgment of the majority of a Divisional Court, which decided that the respondent, Clark, was exempt from liability to the poor rate of the parish of Hampton Wick, but was not exempt from the general district rate of the district, although it was admitted that the district and the parish were in fact co-terminous.

The respondent appealed against so much of that judgment as decided that he was not exempt from the general district rate. No appeal lies against the decision as to the poor rate, and the respondent contended that the appellant, Whenman, was bound by that decision and could not in this appeal question the right of the respondent to exemption from the poor rate. The appellant contended that, although he could not appeal against the decision as to the poor rate, he could question the correctness of it in order to show that the decision as to the district rate was right because there was no exemption from any rate. In the view which I take of the case it is not necessary to decide which of those contentions is right.

The respondent claimed to be exempt by reason of the provisions of the Thames Conservancy Act, 1894. The facts are not in dispute and are set out in the case, and it is only necessary to add that it was admitted on the argument that the entry in the rate-book described the respondent, Clark, as the occupier and the Thames Conservancy as the owners of the property in respect of which payment of the rate was demanded.

(1) [1909] 1 K. B. 860. (2) [1911] 1 K. B. 43.

Three questions arise in the case: (1.) Is the respondent exempt from liability to poor rate by reason of the provisions of s. 289 of the Thames Conservancy Act, 1894? (2.) If so, is he also exempt from liability to the general district rate? (3.) Is the question of the existence of such exemption one that can be entertained by the justices in this proceeding, or is it necessary that it should be decided by quarter sessions on appeal from the justices? The first two of these contentions are of substance; the last is only concerned with procedure.

The answer to the first question depends upon the construction of s. 289 of the Thames Conservancy Act, 1894, which has already been read, and I need not read it again. This property is situated above London Bridge, but not above the city stone. There is no evidence as to how it became vested originally in the predecessors of the conservators. It is not in the occupation of any official of the conservancy, but the rents arising from it are carried to the credit of the "lower navigation fund" under the provisions of s. 240 of the same Act. It seems to me that the premises come within the exact words of the section. They are lands and buildings vested in the conservators in respect of the Thames above London Bridge and therefore exempt from parochial rates.

The argument against this construction, as I understand it, is in substance that, looking at the history of the legislation, it will be seen that the exemption is confined to lands and buildings purchased or used for the purposes of the navigation of the Thames, and that these premises are not shown to have been purchased and are not used for those purposes. It is said that this was the effect of an earlier Act of 1814, which contained words limiting the exemption to lands and buildings so purchased or used, that this same limitation is to be found in the latter part of s. 289 dealing with compensation, and that therefore the former part should be read as containing the same limitation. Lastly it was said that the words "in respect of the Thames" operate to create such a limitation, and that to hold these premises within this exemption is to give no effect to those words. I think the short answer to these contentions is that we must construe the words of the section as they stand, and are not justified in altering their plain meaning even if it has a different effect from the earlier legislation. But it seems to me an equally

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forcible argument to say that as the words said to contain a limitation have been left out in the later legislation it was intended to convey a different meaning, and that it is clear that the wording of each part of each section is not always consistent, e.g., if the words have a limiting effect, then the preamble and the enacting part of s. 19 of the Act of 1814 are not consistent. There was an obvious reason for putting some such words into the Act of 1814, because the Corporation of London were then the conservators of the Thames below the city stone, and as they were owners of property entirely apart from their position as conservators it was necessary to limit the exemption to property vested in them as conservators. Probably the words " vested in the said mayor and commonalty and citizens and their successors by virtue of the said recited Acts " would have been enough, but it may have been intended to remove all doubts. However, as I have said, it is not necessary to speculate as to the reasons for earlier legislation or of changes in language ; we have to construe the present legislation as it stands. I do not think the words " in respect of the Thames " have the meaning contended for by the appellant. They seem to me to have an apt meaning in this section and quite a different one. There are two exemptions, one an exemption from parochial rates, charges, payments, &c., and the other a wider one from parochial and parliamentary rates, charges, payments, &c. One attaches to the property vested in the conservators in respect of the whole Thames above London Bridge, the other to property vested in them in respect of such part of the Thames as is above the city stone, and there are different funds in respect of the two parts of the river. See ss. 240 and 241, where the identical words are used to distinguish the two parts of the river. I think that the expressions are used geographically to distinguish the two parts of the river, and have not the limiting effect contended for. I think therefore under the plain words of the section the premises are exempt from poor rate.

I agree with the Divisional Court that a general district rate is not a parochial rate, and therefore that the words of s. 289 do not exempt the premises from the district rate. But a further point was raised before us, i.e., that by reason of the exemption from the poor rate there was necessarily an exemption from the district rate,

because under s. 211 of the Public Health Act, 1875, the district rate can only be assessed and charged on property liable to the poor rate. This point is not mentioned in the judgments in the Divisional Court, and I doubt if it was taken before them, but it is of course open to the respondent, Clark, here. I think this contention is sound, and I think it is covered by authority in the cases of *Hodgson* v. *Carlisle Local Board* (1), *Reg.* v. *Barclay* (2), and *London Corporation* v. *Associated Newspapers* (3), which, though not on the exact question, seem to me in principle to cover this case.

The result is that if those points were open to the respondent before the justices he is entitled to succeed.

This leaves only the third question, i.e., whether the justices had jurisdiction to examine the respondent's claim for exemption. By s. 256 of the Public Health Act, 1875, the justices are to make an order for payment of the rate "if no sufficient cause for non-payment is shown," words which are not in the corresponding section of the Poor Law Act. Prima facie it would appear that there could hardly be a more sufficient cause for non-payment than the fact that by statute no rate could be charged in respect of the premises, but it is said that we are bound by authority to hold that such an objection as this cannot be taken before the justices.

I do not propose to go into the authorities at any length. After a careful examination of them I have been unable to find any dividing line in principle between the questions which may and the questions which may not be entertained by the justices. Some of Lord Esher's language in *Reg.* v. *Hannam* (4) seems to lay down that no points which can be taken on appeal can be taken before the justices, but that is contrary to many cases, and amongst them to one of which the Court expressly approved in *Reg.* v. *Hannam* (4), i.e., *Birmingham Churchwardens* v. *Shaw.* (5) Sometimes the principle suggested is that the objection must go to the jurisdiction of the overseers, but that it must be a defect of jurisdiction arising from the provisions of the Act under which the rate is made. I can, however, see no difference in principle between a want of jurisdiction arising from that Act of Parliament and a want of jurisdiction

(1) 8 E. & B. 116.
(2) 8 Q. B. D. 306.
(3) [1915] A. C. 674.
(4) 34 W. R. 355.
(5) 10 Q. B. 868, at p. 880.

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arising from another Act. In *Birmingham Churchwardens* v. *Shaw* (1) the distinction is stated as being this, that where the land is shown to be in the parish and A. B. the occupier the case is brought within the Statute of Elizabeth, and that any exemption is matter answering that prima facie case and therefore not a condition precedent to jurisdiction. That may be so in the case with which the Court was there dealing, i.e., an exemption arising from the nature of the occupation, but where the premises are entirely exempt from being rated by reason of the provisions of a public statute I see no reason why the justices should not take notice of such an exemption. Sometimes it has been said that the want of jurisdiction must appear upon admitted facts, but this is contrary to the allowance of an objection to the occupation of the person sought to be charged, which is often a very difficult and hotly contested question of fact.

On the whole I cannot find any principle underlying all the cases and I think the rules laid down from time to time are rules of convenience. If they had been rules always the same and uniformly observed over a series of years, I should have thought it right to follow them; but the cases cited here and in the Divisional Court show that such is not the case. I do not profess to lay down any principle, but, looking at it as I do as a matter of convenience, I think the suggestion of Bowen L.J. in *Reg.* v. *Hannam* (2) is a sound one, and I think such an objection as he mentions should be entertained by the justices. I think this is exactly such a case. There was no question about the facts; the rate-book showed the occupation and ownership, and there remained nothing to do but to apply the terms of the statute to the facts. I do not know whether Bowen L.J. had in his mind a local and personal Act or not, but, as this Thames Conservancy Act, 1894, is by s. 9 of the Interpretation Act, 1889, a public Act and to be noticed as such, I think it comes within his words. I think the rule suggested by the majority of the Divisional Court is a good working rule, at any rate in cases in which there is no dispute as to facts. I think it is not a sound objection to say that somebody might contend that the ownership of the Thames Conservancy stated in the rate-book no longer continued. There was no onus upon the respondent to

(1) 10 Q. B. at p. 881. (2) 34 W. R. 355.

prove anything more than appeared, and no one suggested anything to the contrary. Still less is it a sound objection that the construction of the statute might be contested; that would be in effect to say that no objection resting on a statute could ever be entertained, for it is difficult to imagine a statute as to which no ingenuity could raise a contest. I think, therefore, the objection was properly entertained by the justices.

The result is that the appeal is allowed and all three questions should be answered in the affirmative, the answer to the third question applying to both rates.

Appeal allowed.

Solicitor for appellant: *H. Fawssett.*

Solicitor for respondent: *G. G. Corble.*

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[1914 J. 978.]

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Nov. 25, 26; *Dec.* 2.

Mines—Mining Lease—Subsequent Grant of Building Lease, with Reservation of Mines—Compensation for Injury caused by Mining—Subsidence of Surface—Liability of Mining Lessees and Lessor to Building Lessee.

In 1896 Lord D. granted a lease of the coal under certain land for fifty years. By that lease, which at all material times was vested in the defendant colliery company, the coal was to be worked according to the best and most approved mode of working similar mines in the district. In 1909 Lord D. granted a lease to the plaintiff for ninety-nine years of a plot of land (under which the mining rights had been granted by the lease of 1896) together with the two houses to be erected thereon. That lease contained a covenant for quiet enjoyment, and by a schedule attached all the coal under the demised plot was excepted and reserved, liberty being reserved to the owner and his agents and lessees to work the said coal, "reasonable recompense and satisfaction being made for any injury done to the said demised premises by reason of the exercise of any of the rights aforesaid whether by letting down the surface or otherwise." In 1910 the plaintiff erected two houses on the demised plot, and in 1911 they were damaged by subsidence owing to the working of the subjacent coal by the defendant

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colliery company. In an action by the plaintiff against the colliery company and Lord D. claiming in respect of the damage done to the houses, the judge found as a fact that for the last fifty years collieries in the district had worked on the long-wall system, and that it had been common mining knowledge for at least forty years that under that system the surface necessarily and inevitably subsided as a result of the working :—

Held, (1.) applying *Butterley Co.* v. *New Hucknall Colliery Co.* [1910] A. C. 381, that the colliery company were not liable to the plaintiff inasmuch as, being entitled to work, and having in fact worked, the coal in the mode universally used in the district, namely, the long-wall system, leave to cause subsidence was clearly implied ; but (2.) that Lord D. was liable (*a*) on the ground that the provision in the schedule attached to the plaintiff's lease as to making reasonable recompense and satisfaction for injury done to the demised land by mining operations was a covenant by Lord D. that he would make or cause to be made recompense and satisfaction if injury was done either by himself or his lessees even where his lessees acquired their title before the lease to the plaintiff, and (*b*) on the ground that Lord D. could not derogate from his own grant.

As to the true limits and extent of the covenant for quiet enjoyment, *quaere*.

ACTION tried by Scrutton J. without a jury.

The plaintiff, the owner of two houses in Garnant, in the Amman Valley near Swansea, sued the defendants in respect of damage alleged to have been done to his houses by the subsidence of the surface owing to the working of the mines underneath it.

On July 17, 1896, Lord Dynevor granted to the predecessor in title of the defendants, the Consolidated Anthracite Collieries, a lease of the coal under certain lands in the Amman Valley for fifty years at a certain rent, with royalties. By this lease, which at all material times was vested in the defendant company, it was provided by clause 15 that " The lessee shall when winning and working the said mines win and work the same regularly and properly according to the best and most approved mode of working similar mines in the Amman Valley " ; and by clause 27 it was provided that " The lessee unless authorised by the lessor in writing so to do shall not extend the workings under any farm or other dwelling-house cottage or building now standing or being on the lands under which the mines hereby demised are or within a distance of fifteen yards on either side thereof and in the event of any damage

occurring to such houses cottages or buildings by the breach of this covenant full compensation shall be paid in respect of the same and the lessor shall be kept fully and sufficiently indemnified from all actions or claims in respect thereof."

On October 19, 1909, Lord Dynevor leased to the plaintiff for ninety-nine years at a certain rent a plot of land (under which the mining rights had been granted under the above mentioned mining lease) together with the two houses about to be erected thereon, "excepting and reserving all mines and minerals in manner set forth in the schedule hereto with the powers and authorities therein contained." The schedule was in these terms: "Excepting and reserving all mines and seams veins and beds of coal and ironstone and all other mines and minerals whatsoever in or under the said demised premises with full and free liberty of access ingress egress and regress for the owner or owners of the said mines seams veins and beds and his or their agents lessees and workmen and all other persons authorised by him or them from time to time and at all times during this demise with horses carts and carriages or without to enter into and upon the said demised premises and to dig try and search for and work the said mines seams veins and beds of coal and ironstone and other mines and minerals and to have take and carry away all or any of the produce of the said mines seams veins and beds and any other mines and minerals whatsoever and to set up and construct any engines works and buildings and to make and maintain any roads and ways for the purposes aforesaid or any of them reasonable recompense and satisfaction being made for any injury done to the said demised premises by reason of the exercise of any of the rights aforesaid whether by letting down the surface or otherwise." The two houses to be erected by the plaintiff on the demised premises were to be built in a workmanlike and substantial manner under the inspection of Lord Dynevor's agent or surveyor according to the specification and plan to be approved of and deposited with the said agent. The lease also contained the following clause: "And the said lessor covenants with the said lessee that the said lessee paying the rent hereby reserved and observing and performing the covenants and conditions herein contained and on his part to be observed and performed shall and may peacefully and quietly possess and enjoy the said premises hereby demised during the said

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term without any lawful interruption from or by the said lessor or any person rightfully claiming from or under him."

The plaintiff completed the erection of the houses on the demised land in November, 1910, without the approval of plans or without inspection on behalf of Lord Dynevor. In February, 1911, the houses began to show signs of subsidence. The defendant company in fact worked coal from underneath the plaintiff's houses, and it was admitted that some damage had been caused to them thereby, but it was alleged that part of the damage was due to defective footings and failure to comply with the local by-laws.

At the trial evidence was given, and Scrutton J. found it to be the fact, that for the last fifty years the Amman Valley collieries had worked on the long-wall system; that under this system the surface necessarily and inevitably subsided as the result of the working; that a similar result followed working under the pillar and stall system; and that this had been common mining knowledge for at least forty years. The colliery company in fact worked on the long-wall system.

It was agreed that Scrutton J. should deal only with the question of liability, and that questions as to the quantum of damage should be settled by a skilled local man after inspection on a proper direction by the judge.

Tindal Atkinson, K.C., and *Meager*, for the plaintiff. The plaintiff is entitled to damages from the defendants or from one or other of them.

Leslie Scott, K.C., and *McCardie*, for the colliery company. The mining lease of 1896 when construed in the light of the surrounding circumstances, including the fact established by the evidence that the method of working coal mines in the district necessarily causes subsidence of the surface, impliedly conferred upon the defendant company the right to let down the surface. Clause 27 of the lease only prevents the company from working underneath buildings in existence at the date of the lease. The case is governed by *Butterley Co.* v. *New Hucknall Colliery Co.* (1), although the House of Lords was there dealing not with a case of surface and seam, but with overlying and underlying seams; see also *Beard* v.

(1) [1910] A. C. 381.

Moira Colliery Co. (1) and the Scottish decisions in *Bank of Scotland* v. *Stewart* (2) and *Anderson* v. *M'Cracken Brothers.* (3) The case of *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (4) was decided on the construction of an Inclosure Act of 1757, and it was held that upon the true construction of that Act the common law right of the surface owner to the support of the surface was not taken away by express words or by necessary implication; but at the date of that Act it was not known that mining necessarily involved subsidence of the surface. That fact was brought to the notice of the Courts for the first time by proper evidence in the *Butterley Case* (5): see the judgment of Fletcher Moulton L.J. in that case in the Court of Appeal. (6) *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (4) and the earlier cases, including *Davis* v. *Treharne* (7), *Love* v. *Bell* (8), and *New Sharlston Collieries Co.* v. *Westmorland* (*Earl*) (9), where no evidence was given similar to that given in this case and in the *Butterley Case* (5) and in the Scottish cases of *Bank of Scotland* v. *Stewart* (2) and *Anderson* v. *M'Cracken Brothers* (3), are not in point. If the lessor wished to reserve rights in the mining lease he should have done so expressly: see *Mundy* v. *Rutland* (*Duke*) (10); *Birmingham, Dudley and District Banking Co.* v. *Ross.* (11) [*Smith* v. *Darby* (12) was also referred to.]

Gore-Browne, K.C., and *Trevor H. Hunter*, for Lord Dynevor. The colliery company, not Lord Dynevor, caused the subsidence, and Lord Dynevor is not liable for their acts. Lord Dynevor did not impliedly authorize the colliery company to let down the surface: see *Davis* v. *Treharne* (7), where the House of Lords decided that a clause in a mining lease authorizing the lessee to work the mines "in the usual and most approved way in which the same is performed in other works of the like kind in the county" —words to the same effect as those in the mining lease in this case— did not entitle the lessee to work the mines so as to injure or interfere with the rights of other people. That case was approved and

(1) [1915] 1 Ch. 257.
(2) (1891) 18 R. 957.
(3) (1900) 2 F. 780.
(4) [1906] A. C. 305.
(5) [1910] A. C. 381.
(6) [1909] 1 Ch. 37, at p. 49.
(7) (1881) 6 App. Cas. 460.
(8) (1884) 9 App. Cas. 286.
(9) [1904] 2 Ch. 443, n.
(10) (1883) 23 Ch. D. 81.
(11) (1888) 38 Ch. D. 295, 313.
(12) (1872) L. R. 7 Q. B. 716.

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adopted as good law in *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (1) It was also applied in *New Sharlston Collieries Co.* v. *Westmorland* (*Earl*) (2), where the Earl of Halsbury said that "the mere fact of giving a right to sink pits and to work or get coal does not of itself establish a right to get rid of the common law right of the surface owner to have his surface undisturbed." At the date of that decision the effect of underground workings on the surface was well known. In *Butterley Co.* v. *New Hucknall Colliery Co.* (3) *Davis* v. *Treharne* (4) and the other cases were not disapproved and being decisions of the House of Lords could not be overruled; they are still therefore binding authorities. It is to be observed, moreover, that in the *Butterley Case* (3) the House was not considering surface rights; it was dealing with an overlying and an underlying seam of coal. At the date when the mining lease was granted to the colliery company in this case the decision in *Davis* v. *Treharne* (4) was familiar to all conveyancers, and if it had been intended to get rid of the effect of that decision clear language would have been used with that object. The parties contracted on the basis that *Davis* v. *Treharne* (4) correctly stated the law. The plaintiff can therefore only look to the defendant company for damages. But, even assuming that the company is not liable, the plaintiff has no claim against Lord Dynevor. The effect of the reservation in the lease to the plaintiff is that if Lord Dynevor himself works the coal under the demised land, or if, subsequent to the date of that lease, he granted to any one else the right to work the coal, he would be liable, but only then. There is no covenant that Lord Dynevor will pay compensation if some one claiming under an earlier conveyance or lease works the coal and causes damage. There was no warranty by Lord Dynevor that at the date of the lease to the plaintiff the land was not honeycombed or that Lord Dynevor had not granted to some one else the right to let down the surface. A lessee has constructive notice of his lessor's title: *Patman* v. *Harland*. (5) With regard to the claim by the plaintiff as founded upon an alleged breach of the covenant for quiet enjoyment, it was said by Willes J., giving the judgment

(1) [1906] A. C. 305; see per Lord Macnaghten at p. 313.
(2) [1904] 2 Ch. 443, n.
(3) [1910] A. C. 381.
(4) 6 App. Cas. 460.
(5) (1881) 17 Ch. D. 353.

of the Exchequer Chamber in *Dennett* v. *Atherton* (1), that "the covenant for quiet enjoyment, whether with or without a partially restrictive covenant, has, therefore, been regarded as a covenant to secure title and possession, and not to guarantee to the tenant that he may lawfully use the land for any purpose not in the restriction." Willes J. pointed out that to give the covenant a wider effect would involve strange consequences; and then he put this illustration, anticipating the present case: "If a seller or lessor had worked out mines, and the purchaser or lessee were to build a house, which sunk into the old workings, here would be a breach at once. In other words a warranty would be read in, that the land was capable of being used for any purpose or for any purpose not expressly excluded. This would be a novelty in itself, and inconsistent with the settled rule, that a covenant for quiet enjoyment excludes all inferences of an implied covenant for title."

Tindal Atkinson, K.C., in reply.

[SCRUTTON J. If Lord Dynevor gave a right to the colliery company to let down the surface the plaintiff cannot get damages against them.]

I adopt the argument for Lord Dynevor that the colliery company are liable.

Assuming, however, that the colliery company had a right to let down the surface, the plaintiff has clearly a right to claim against Lord Dynevor. That claim can equally well be based on the language of the schedule in the lease to the plaintiff, on the ground that Lord Dynevor could not derogate from his own grant, or on the ground of a breach by him of the covenant for quiet enjoyment.

There is no ground for the contention put forward on behalf of Lord Dynevor that the provision in the schedule for the payment of compensation only applies in respect of acts committed by the lessor himself or by some one to whom he has granted rights subsequent to the lease to the plaintiff. The word "lessees" used in the schedule is satisfied by applying it to any lessees whether they acquired their rights prior to or subsequent to the plaintiff's lease. The object of the words in the schedule was to provide that if

(1) (1872) L. R. 7 Q. B. 316.

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the surface was let down by any one compensation should be paid. Secondly, Lord Dynevor is liable for having derogated from his own grant: see per Cotton L.J. in *Rigby* v. *Bennett*. (1) Thirdly, Lord Dynevor is liable on the ground of a breach by him of the covenant for quiet enjoyment. It is not correct to say that that covenant only applies to title. In *Sanderson* v. *Mayor of Berwick-upon-Tweed* (2) the Court of Appeal held that any substantial interruption of the enjoyment of the property was sufficient to constitute a breach of the covenant.

[SCRUTTON J. That does not appear to be consistent with the decision in *Dennett* v. *Atherton* (3), and in *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Anderson* (4) Lindley M.R. pointed out that *Sanderson* v. *Mayor of Berwick-upon-Tweed* (2) must be taken with reference to the facts then before the Court.]

The plaintiff clearly comes within the decision in *Sanderson's Case*. (2) That case was followed by Buckley J. in *Tebb* v. *Cave* (5), where he held that the defendant, who sold a house to the plaintiff with whom he covenanted for quiet enjoyment, had committed a breach of that covenant by erecting on an adjoining piece of land buildings of such a height that they caused the chimneys of the plaintiff's house to smoke badly.

[SCRUTTON J. That case was doubted by Romer L.J. and Cozens-Hardy L.J. in *Davis* v. *Town Properties Investment Corporation*. (6)]

Anything which directly interferes with the enjoyment or possession of the property constitutes a breach of the covenant. In this case there has clearly been such an interference, as the houses have been undermined. [He also referred to *Berkley* v. *Shafto*. (7)]

Leslie Scott, K.C., referred to *Markham* v. *Paget*. (8)

Cur. adv. vult.

Dec. 2. SCRUTTON J. read the following judgment:—Walter Jones, the owner of two houses in Coronation Road, in the Amman

(1) (1882) 21 Ch. D. 559, at p. 569.
(2) (1884) 13 Q. B. D. 547.
(3) L. R. 7 Q. B. 316.
(4) [1898] 2 Ch. 394.
(5) [1900] 1 Ch. 642.
(6) [1903] 1 Ch. 797.
(7) (1863) 15 C. B. (N.S.) 79.
(8) [1908] 1 Ch. 697.

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Valley near Swansea, brings an action against Lord Dynevor, who granted him a long lease of the land on which the houses are built, and the Consolidated Anthracite Collieries, Limited, who under a mining lease from Lord Dynevor work the seams of coal under his land, for damage alleged to be done to his houses by the subsidence of the surface owing to the working of the mines underneath it.

The case is purely a Welsh one involving a large number of Welsh witnesses. Against the wish of the plaintiff and at the instance of the defendants, who offered to pay the extra cost of trial in London, the case was ordered to be tried in London. This in my view is not fair to London cases, and is in addition a ridiculous waste of money of the lay clients, as no possible advantage has been gained by trial in London and great extra expense has been incurred. All the evidence might quite well have been taken in Swansea at the Summer Assizes and the legal argument, if any, adjourned to London if necessary. I hope the Masters or district registrars will be more vigorous in keeping these cases in their local venue, where they can be tried with due economy.

The case arises in this way: On July 17, 1896, Lord Dynevor granted to the predecessor of the colliery company a mining lease granting the coal under certain lands for fifty years, with power to sink pits and work the mines at a rent and royalty which must be at least 80*l.* a year. The lessee was to win and work the mines regularly and properly according to the best and most approved mode of working similar mines in the Amman Valley. He was not to extend his workings under any building then standing on the lands, and if any damage occurred to such houses full compensation was to be paid.

The plaintiff's first expert witness stated to counsel for the colliery company in cross-examination that for the last fifty years the Amman Valley collieries had worked on the long-wall system; that under this system the surface necessarily and inevitably subsided as the result of the working; that a similar result followed working under the pillar and stall system; and that this had been common mining knowledge for at least forty years. On this the colliery company did not call their expert witnesses who were there to prove this, and I find the evidence as above stated to be the fact.

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On October 19, 1909, Lord Dynevor leased to the plaintiff for ninety-nine years a plot of land (under which the mining rights had been granted to the colliery company) together with the two houses about to be erected thereon, "excepting and reserving all mines and minerals in manner set forth in the schedule hereto with the powers and authorities therein contained." The schedule excepted and reserved all mines under the demised premises, with liberty of access for the owners of the said mines, their agents, lessees, and workmen, to enter upon the demised premises and work the said mines and carry away the produce of the mines, "reasonable recompense and satisfaction being made for any injury done to the said demised premises by reason of the exercise of any of the rights aforesaid whether by letting down the surface or otherwise." The two houses were to be built under the inspection of the lessor's agent and according to a plan approved by him. The lessee was to repair the houses. The lease concluded with an express covenant for quiet enjoyment without any lawful interruption from or by the said lessor or any person rightfully claiming from or under him.

The houses were built without the approval of plans, or apparently without the lessor's troubling to inspect them, and were completed in November, 1910. In February, 1911, they began to show signs of subsidence. The colliery company in fact worked the coal out from underneath them. Counsel for the colliery company admitted, and I understood counsel for Lord Dynevor to agree, that some damage had been caused to the houses by colliery working. He desired to suggest that part of the damage was due to defective footings on a clay foundation and failure to comply with the local by-laws. It was agreed that questions of the amount of damage should be settled by a skilled local man after inspection on a proper direction from me.

I therefore proceed to determine the questions of liability argued before me. The colliery company say they had implied liberty from Lord Dynevor to remove the support of his land and therefore his lessee cannot sue them. Lord Dynevor says the colliery company have no such liberty and therefore he is not liable to his lessee for their unlawful acts. He further says that if the colliery company have the liberty there is nothing in the building lease making him liable to the lessee.

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The first question appears to be the true construction of the mining lease. The colliery company contend that it gives them a right to let down the surface if that result is the necessary consequence of their working the mine in the only way used in the district, as the evidence shows that it is. The landlord says that it does not give them any such right and, apparently, that if they are right in saying they cannot work the mine without letting down the surface then they must not work at all. On this point I must be guided by the latest decision of the House of Lords in the case of *Butterley Co.* v. *New Hucknall Colliery Co.* (1) In that case the question was between the lessees of upper and lower seams of coal in a colliery. The lessees of the upper seam alleged that the lessees of the lower seam were by working lowering their upper seam and rendering its working more expensive. The lessees of the lower seam replied that their seam could not be commercially worked without lowering the upper seam, which only meant slightly increased expense of working to that seam. The lessees of the lower seam gave evidence—which is set out with some particularity in the judgment of Fletcher Moulton L.J. in the Court of Appeal (2) —that when the leases were granted "it was common knowledge to all persons conversant with mining that it would be impossible to work the lower seam at all without causing damage by subsidence to the upper seam": see per Cozens-Hardy M.R. at p. 47. And on the Court being told this, which the Lord Justice says persons conversant with coal mining had known for many years, the Court by necessary implication excluded the right to support which the upper seam of the lessor would otherwise have had on the principle explained by Lord Loreburn in the *Butterknowle Case* (3), for, said the Court, a man who has granted a right to work a mine must be taken to allow its being worked in the only way in which it can be worked whatever the effect on his other property may be. The House of Lords affirmed this decision on the same grounds, distinguishing a number of their previous decisions apparently in the opposite sense, the latest of which was the *Butterknowle Case* (3), on the ground that they had not in those cases evidence of surrounding facts to raise such an implication.

(1) [1910] A. C. 381. (2) [1909] 1 Ch. at p. 49.
(3) [1906] A. C. 305.

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Now in this case I have the evidence already stated as to the position when the lease was granted, and I find as a fact that the parties knew that the seam could not be worked on the system universally used in that valley, or indeed on any system, without some subsidence of the surface. I note that this is a case of seam and surface, *Butterley's Case* (1) being seam and seam; and I observe that some members of the Court of Appeal in *Butterley's Case* (1) thought the question of support of the surface might be different from support of a seam as the surface might be "destroyed" without support; the seam only rendered more difficult of working. Once, however, one gets the evidence that the seam cannot be worked without the surface subsiding, I do not see any difference in necessity of implication that the lessee may let down the surface. I do not quite understand the expression that the surface is "destroyed" as applied to this case. The houses are all standing and people are living in them, though perhaps in some fear.

I have come to the conclusion, therefore, that the colliery company are right in saying they have a grant from Lord Dynevor allowing them to let down the surface of his land by mining in the customary manner. This being so, subsequent lessees of the surface from Lord Dynevor have no right of action against the colliery company for damage done by subsidence to the buildings they have erected, the subsidence arising from the lawful operations of the colliery company. This entitles the colliery company to be dismissed from the action.

The next question was whether the plaintiff could recover damages from his lessor, Lord Dynevor, and on what grounds. The plaintiff's counsel did not give me so much help as I could have wished on this point. He apparently took the view that he was clearly entitled to recover against one of the defendants, and it was for the Court, assisted by the struggles of the two defendants to escape liability, to find out which. Consistently with this view he took no part in the discussion as to the meaning of the mining lease, and while against Lord Dynevor I understood him to say that he could succeed equally well on any one of three grounds—the so-called "reservation" in the schedule, damages for derogation from

(1) [1910] A. C. 381; [1909] 1 Ch. 37.

grant, and breach of the covenant for quiet enjoyment—he gave me very little help in investigating the liability under each head. I have had, therefore, to investigate the subject for myself.

First, as to the effect of the scheduled reservation. I understood counsel for Lord Dynevor to argue that it was a reservation subject to a condition of compensation; that its effect was that any one who dealt with the reserved subject-matter without performing the condition of giving compensation was a trespasser; that his client had done nothing since the building lease either by entering and taking or authorizing others to enter and take the minerals, and therefore could not be sued; while the fact that he had before the building lease authorized some one to enter was constructively known to the lessee, who might have investigated the title and did not, and could not therefore complain. With all respect to technicalities, this argument seemed to me to make the scheduled reservation nonsensical. It allowed the lessor to insert a provision which any ordinary person would read as providing that he should receive compensation if his land was let down by mining, but which really meant that if and as he had already granted the right of letting down the land no compensation should be paid. But I do not think the argument was technically accurate. I understand a reservation in its technical sense to be the regrant out of the subject-matter conveyed of something not previously existing, as a rent or an easement. The retention by the grantor of something already existing in the subject-matter, as mines and the right to work them, is an exception, and provisions relating to what the grantor shall do with regard to the matter excepted usually operate in covenant. Counsel for Lord Dynevor protested vigorously against my using the word "covenant" with regard to any part of the scheduled reservation. I think he had forgotten the case of *Lord Dynevor* v. *Tennant* (1), where a proviso by way of reservation was treated not as a regrant but as a covenant. I think the last part of the schedule is a covenant by Lord Dynevor that he will make or cause to be made reasonable recompense or satisfaction if any injury is done to the demised land by the mining operations by letting down the surface, whether such operations are by himself, the owner, or his lessees, and whether such lessees take title before

(1) (1888) 13 App. Cas. 279.

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or after the building lease. I think the plaintiff is entitled to damages against Lord Dynevor on this ground.

I think the same result would follow on a claim against the lessor for damages for derogating from his grant, on which I refer to the judgment of Swinfen Eady J. in *Markham* v. *Paget* (1), for reference to which I was not indebted to either counsel immediately concerned in the discussion, but to counsel for the colliery company as amicus curiae.

This renders it unnecessary for me to express a decided opinion on whether the plaintiff cannot also succeed for a breach of the covenant for quiet enjoyment. On this question Cozens-Hardy L.J. in *Davis* v. *Town Properties Investment Corporation* (2), referring to the decision in *Tebb* v. *Cave* (3), said: "Should the question raised in that case hereafter come before the Court of Appeal, it will be necessary to consider carefully the true limits and extent of the covenant for quiet enjoyment." I respectfully agree that the decisions of the Court of Appeal are at present not easy for a judge of first instance to follow. In *Dennett* v. *Atherton* (4) Willes J., giving the judgment of the Court of Exchequer Chamber, treated the covenant as one to secure title and possession only, and not enjoyment in any particular way, and considered it too clear for argument that the lessee of land whose house had fallen in because his lessor worked the mines could not recover under this covenant. In *Sanderson* v. *Mayor of Berwick-upon-Tweed* (5) the Court of Appeal treated the escape of water through a defective drain in the land demised, the water coming from the lawful use of the drain by another tenant of the landlord, as a breach of the covenant because the enjoyment of the land was in fact interfered with. In *Harrison, Ainslie & Co.* v. *Lord Muncaster* (6) the Court of Appeal explained *Sanderson's Case* (5) as justifying the position that an interference with enjoyment not going to title might be a breach of the covenant, but going no further, and doubted whether the "abstract proposition" of Fry L.J. could be fully supported. In *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Anderson* (7)

(1) [1908] 1 Ch. 697.
(2) [1903] 1 Ch. at p. 805.
(3) [1900] 1 Ch. 642.
(4) L. R. 7 Q. B. 316.
(5) 13 Q. B. D. 547.
(6) [1891] 2 Q. B. 680.
(7) [1898] 2 Ch. 394.

the Court was rather astonished at the extent to which the decision in *Sanderson's Case* (1) was being carried, and was inclined to think that whilst structural injury might be a breach, temporary inconvenience or temporary interference with the enjoyment could not be such a breach. In *Tebb* v. *Cave* (2) Buckley J. held that it was a breach of the covenant to erect a house on adjoining land so that the chimneys of the demised house smoked ; and in *Davis's Case* (3) Romer L.J. and Cozens-Hardy L.J. doubted whether *Tebb* v. *Cave* (2) was rightly decided, and Romer L.J. doubted whether anything but "direct interference" with enjoyment would do. In *Markham* v. *Paget* (4), where Swinfen Eady J. held that subsidence from coal workings was within the implied covenant for quiet enjoyment, none of these cases were cited to him. Under these circumstances I am glad to be able to avoid deciding the question, as the present state of the decisions seems to me calculated to lead judges of first instance astray, as two members of the Court of Appeal thought had occurred to Buckley J. in *Tebb* v. *Cave*. (2) It will, of course, be open to the plaintiff to rely on this point in the Court of Appeal if he desires.

The plaintiff is therefore entitled to a judgment against Lord Dynevor for damages caused by subsidence.

The colliery company said that part of the damage was caused by bad building of the house. If Lord Dynevor, whose agents might have supervised the building and did not, desires to say this before the referee he will be at liberty to do so. Counsel for the plaintiff said very truly that a man who does an unlawful act cannot complain that his victim was not in full bodily health and so lessen his damages. In a sense this is true, but I think it is always open to a wrong-doer to prove if he can that the subject of the wrong-doing was at the time of the tort only of a particular value by reason of its own weakness, and to limit his damages to that value. If in this case the house was so badly built that, if there was no mining, it would have fallen down in a year, this must be taken into account in fixing the damage caused by knocking it down, and to

(1) 13 Q. B. D. 547.
(2) [1900] 1 Ch. 642.
(3) [1903] 1 Ch. 797.
(4) [1908] 1 Ch. 697.

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that extent the defective building of the house, if there is any, must be considered.

Judgment accordingly.

Solicitors for plaintiff: *T. D. Jones & Co., for W. M. Knoyle, Glanamman.*

Solicitors for colliery company: *Few & Co., for Bythway & Son, Pontypool.*

Solicitors for Lord Dynevor: *Warrens.*

J. S. H.

Applied. G. W. GRACE & CO., LTD. *v.* GENERAL STEAM NAVIGATION CO., LTD. [1950] 1 All E.R. 201.

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Dec. 13, 15.

PALACE SHIPPING COMPANY, LIMITED *v.* GANS STEAMSHIP LINE.

[1915 P. 572.]

Ship—Charterparty—Employment of Ship between "safe ports"—What is a "safe port."

Where a charterparty provides for the employment of a vessel between "safe ports," the word "safe" implies that the ports must be both physically and politically safe. Dangers likely to be incurred on the voyage to a particular port may be taken into account in considering whether such port is safe to go to or not. In each case it is a question of fact and a question of degree.

ACTION tried by Sankey J. as a commercial cause.

The following statement of facts is taken from the judgment:—"In this case the plaintiffs claim a declaration that Newcastle-upon-Tyne was not in February, 1915, a safe port within the meaning of clause 3 of a charterparty dated April 18, 1913, and made between them and the defendants, and, further, that the defendants by ordering the plaintiffs' steamship *Frankby* to proceed to Newcastle during that month to load a cargo for Barcelona committed a breach of the charterparty which entitled them to withdraw the ship from the defendants' service.

"The facts are as follows: By a charterparty of the above date the plaintiffs agreed to let and the defendants agreed to hire the British steamship *Frankby* for a term of five years at the rate of 1440*l.* per calendar month for employment between a safe port or

safe ports between 50° N. and 50° S., subject to certain exceptions which are not material to the present case. The northern limit was afterwards extended to 60 degrees N.

" There was a stipulation in the charterparty that upon any breach thereof the plaintiffs should be at liberty to withdraw the vessel from the service of the defendants.

" In the first week of February this year the vessel was at Havre and had been provisionally ordered to proceed to Cardiff to load. The owners thereupon arranged to fit her up with stores and a new donkey boiler at that port. On February 11 the German Government promulgated the following announcement: 'The waters round Great Britain and Ireland, including the entire English Channel, are hereby declared a military area. From February 18 every hostile merchant ship within these waters will be destroyed even if it is not always possible to avoid dangers which thereby threaten the crews and passengers.'

" On February 13 the defendants by their agents cancelled their provisional instructions for the vessel to go to Cardiff and ordered her to the Tyne. This order was a serious inconvenience to the plaintiffs, who had already got their stores and donkey boiler at Cardiff, and they wrote protesting against it not only on this ground, but also upon the ground that Newcastle was not a safe port within the meaning of the charterparty. They did not, however, withdraw the vessel from the service of the defendants, but allowed her to leave Havre upon February 19, the day after that upon which, according to the German declaration, every hostile ship in the waters round Great Britain and Ireland was to be destroyed.

" In spite of the German threat the vessel appears to have had a safe and not very speedy voyage to Newcastle. She there loaded a cargo of coals for Barcelona, left, and had a similar voyage down the North Sea and English Channel. As far as I am able to judge from her log-book she was from first to last in no real danger or apprehension of danger.

" The plaintiffs contend that the order for the steamer to proceed to Newcastle was a breach of the charterparty because Newcastle was not a safe port.

" The defendants contend that Newcastle was perfectly safe, and, secondly, that at any rate the plaintiffs have waived their rights and

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are not entitled to withdraw the vessel because after their protest they allowed her to continue in the defendants' service." (1)

Roche, K.C., and *A. Hyslop Maxwell*, for the plaintiffs. In considering whether a port is a safe port not only physical impediments but also obstacles imposed by human agency have to be taken into account: *Ogden* v. *Graham*. (2) In that case a port which had been closed by order of the Chilian Government and to which a ship could not proceed without being confiscated was held not to be a "safe port." Further, in considering this question, not only the port itself but the safety of the approaches thereto must be taken into account: *Nobel's Explosives Co.* v. *Jenkins* (3), where the risk of seizure between Hong Kong and Yokohama was held to render the entering of the port of Yokohama unsafe. Here the risks attending the voyage from Havre to Newcastle were so serious in view of the German threat that the latter port was not a "safe port" within the meaning of the charterparty.

Leck, K.C., and *Raeburn*, for the defendants. No doubt there were risks on the voyage to Newcastle, but the existence of those risks did not entitle the plaintiffs to say that Newcastle was an unsafe port. No case has decided that a port is unsafe because of the risks of the voyage to that port. In *Nobel's Explosives Co.* v. *Jenkins* (3) Mathew J. was dealing with a case where in the bill of lading there was a clause empowering the master, if he considered the entering of or discharging in the port of discharge to be unsafe by reason of war or disturbance, to land the goods at the nearest safe and convenient port. That case is no authority for the wide proposition that a port is rendered unsafe by reason of the perils attaching to the voyage thereto—a proposition which, if sound, would involve this, that every port in the United Kingdom, at the material time, was unsafe. As to *Ogden* v. *Graham* (2), the port itself in that case was unsafe. Here it is not suggested that the port of Newcastle itself was unsafe.

Roche, K.C., in reply cited *East Asiatic Co.* v. *S.S. Tronto Co.* (4)

Cur. adv. vult.

(1) As Sankey J. did not find it necessary to deal with the question of waiver, it is considered unnecessary to set out the argument on that point.

(2) (1861) 1 B. & S. 773.

(3) [1896] 2 Q. B. 326.

(4) (1915) 31 Times L. R. 543.

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Dec. 15. SANKEY J. read the following judgment, which, after stating the facts already set out, continued: The first point I have to decide is whether Newcastle was a safe port in February. It is admitted by both parties that Newcastle itself was safe, but the plaintiffs say that the dangers of the voyage there must be taken into account and were such as to make the port unsafe within the meaning of the charterparty.

The defendants, on the other hand, contend that the dangers of the voyage are not material to the question whether the port was a safe one, and, further, that such dangers as either existed or might be apprehended on the voyage were not of a character to make the port unsafe. I am doubtful if it has ever been definitely determined by a judicial decision whether dangers on a voyage to a port make the port unsafe. Two cases were cited to me, namely, *Ogden* v. *Graham* (1) and *Nobel's Explosives Co.* v. *Jenkins* (2), but neither seems to be conclusive.

In my view the word "safe," when used in connection with the word "port," implies that the port must be both physically and politically safe, and I think that the action either of nature or man may render a port unsafe. I have only to deal with the agency of man in the present case. At the moment no English port would be a safe port for a German vessel. Neither is a place which a vessel can only go to at a certain risk of confiscation a safe port: see the observations of Blackburn J. in *Ogden's Case.* (1)

There does not appear to be any sound distinction between a port to which a vessel is proceeding with a liability to be sunk or confiscated by enemy vessels lying thereat or in the approaches thereto and a port to which a vessel is proceeding with a liability to be sunk or confiscated by enemy vessels at a greater distance. Modern inventions like wireless telegraphy and submarines have quite altered old rules and old conceptions, and I am of opinion that dangers likely to be incurred on a voyage to a port may be taken into account in considering the question whether such port is safe to go to or not. In each case it is a question of fact and a question of degree.

I now proceed to the consideration of the question of fact, whether the port of Newcastle had become unsafe. It will be remembered

(1) 1 B. & S. 773. (2) [1896] 2 Q. B. 326.

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that the German threat was that as from February 18 every hostile merchant ship in English waters would be destroyed. The performance, however, fell short of the promise. [His Lordship dealt with the figures as to the arrivals and sailings and the losses and continued:] It seems clear that such circumstances cannot be said to have made the port of Newcastle unsafe in February last. However much one must regret the loss of the lives of innocent and non-combatant crews and passengers which has been caused by those responsible for the actions of the German navy, it is impossible to regard the results achieved as other than insignificant, or as even appreciably affecting the strength and spirit of the British mercantile marine.

Finding as I do, therefore, that Newcastle was a safe port within the meaning of the charterparty, it is unnecessary to consider whether the plaintiffs have waived their rights, and the result is that I must dismiss the action with costs.

Judgment for defendants.

Solicitors for plaintiffs: *Botterell & Roche, for Weightman, Pedder & Co., Liverpool.*

Solicitors for defendants: *Thain Davidson & Co.*

J. S. H.

HALSEY and Another *v.* LOWENFELD.
LEIGH and CURZON, Third Parties.

1915
Nov. 29.

Alien Enemy—Action against—Cause of Action accruing after Outbreak of War—Illegality—Right of Alien Enemy Defendant to take Third Party Proceedings.

An alien enemy may be sued for breach of contract in the King's Courts as well where the cause of action accrued after the outbreak of war as where it accrued before the war began.

An alien enemy defendant cannot issue a third party notice under Order XVI., r. 48, the effect of such a notice being to initiate an independent proceeding in which the defendant is the actor.

Trial of action before Ridley J.

By a lease dated March 18, 1896, Edgar Bruce demised to the defendant, Henry Lowenfeld, the Prince of Wales' Theatre in Coventry Street for the term of twenty-four years from Christmas, 1895, at a yearly rent of 6000*l.* payable by monthly instalments of 500*l.* on the last Saturday in each month in advance. A sum of 3250*l.* was deposited by the defendant with the lessor as a security for the payment of the rent and performance of the covenants, and the lease provided that this deposit should be returned to the lessee by deductions from the rent of 500*l.* per annum during the first six of the last seven years of the lease, and of 250*l.* in the last year. The last seven years of the lease commenced at Christmas, 1912. In March, 1899, the defendant assigned the lease to G. W. Lederer, who covenanted for himself and his assigns to indemnify the defendant against liability for the rent. Lederer assigned the benefit of the lease with a like covenant to one George Edwards, who in August, 1899, assigned the benefit of the lease with a like covenant to J. H. Leigh, in whom the term was still vested at the time of action brought. Subsequently Leigh sublet the theatre to one Frank Curzon, who was at all times material to the action in possession of the theatre as such sub-lessee. On June 26, 1915, one month's rent of 500*l.* was due to the plaintiffs and was unpaid, and on July 15, 1915, the plaintiffs as assignees of the lessor's interest under

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the lease commenced the action against the defendant to recover the said rent. On September 10, 1915, a second action was commenced to recover 1000*l.*, being the two months' rent due on July 31 and August 28. The two actions were consolidated. There were no pleadings, but the defendant gave notice that he would counterclaim against the plaintiffs for the sums of 500*l.* per annum which ought to have been allowed to him under the lease by way of repayment of the deposit since Christmas, 1912, and which had not been so paid to him. The defendant, who was an Austrian subject, gave notice that if he was held to be an alien enemy by reason of the war between this country and Austria he would contend that his contract with the lessor was avoided, or at all events suspended, by the war. He also served third party notices under Order XVI., r. 48, upon Leigh as the owner of the term and upon Curzon as the sub-lessee in possession, claiming that if he was held liable to the plaintiffs for the rent the said third parties were liable to indemnify him. At the trial, on it being proved that in August, 1915, the defendant was living at Marienbad in Austria, and that in September, 1915, when he was last heard of, he was living at Vienna, the judge said that he should hold that the defendant was an alien enemy.

Rose-Innes, K.C., and *Lilley*, for the plaintiffs.

Heber Hart, K.C., and *Blanco White*, for the defendant. The effect of war is to suspend during the continuance of hostilities all contracts made between subjects of the belligerent States before the war began. All intercourse with the enemy is illegal. "A declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and such intercourse, except with the licence of the Crown, is illegal": per Willes J., delivering the judgment of the Exchequer Chamber in *Esposito* v. *Bowden*. (1) And this prohibition is not confined to commercial intercourse. In *Robson* v. *Premier Oil and Pipe Line Co.* (2) Pickford L.J. said: "The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an

(1) (1857) 7 E. & B. 763, at p. 779. (2) [1915] 2 Ch. 524.

alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction." The intercourse involved in the performance of the obligations under a lease is prohibited, so that the plaintiffs cannot sue the defendant on his contract during the continuance of the war. It cannot be averred with any certainty that the performance by the defendant of his contract in this case cannot possibly result in detriment to this country or advantage to the enemy; and even if it could, that would not necessarily conclude the matter. For Pickford L.J. in the same case leaves the question open. He says: "We do not think it necessary to decide whether the principle extends to intercourse, if such there be, which could not possibly tend to detriment to this country or to advantage to the enemy." It is not disputed that an alien enemy may be sued—*Porter* v. *Freudenberg* (1)—provided there is a cause of action; as there would have been in this case if the rent sued for had been due before the beginning of the war. But here there was no cause of action, for the defendant's contract under the lease was suspended before the rent had accrued due. It is true that in *Porter* v. *Freudenberg* (1) the rent which the Court of Appeal held that the alien enemy defendant was liable to be sued for accrued due at Michaelmas, 1914, nearly two months after the war began. But the present point was not taken. The Court there was concerned with the question of process, and not with the question of the rights of the parties. All that that case was intended to decide was that a cause of action which was assumed to exist might be enforced notwithstanding the continuance of the war. Secondly, if the defendant is to be held liable to the plaintiffs for the rent, he is entitled to be indemnified by the third parties, and in order to realize that indemnity he is entitled to serve a third party notice. The liability of an alien enemy to be sued involves the right to take all necessary steps to defend himself. Lord Reading C.J. in the above case adopted with approval the language of the Supreme Court of the United States in *McVeigh* v. *United States* (2): "Whatever may be the extent of the disability of an alien enemy to sue in the Courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and

(1) [1915] 1 K. B. 857. (2) (1870) 11 Wallace, 259.

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appliances of defence." A third party notice is such an appliance of defence.

Rose-Innes, K.C., in reply. A declaration of war does not bring about a cesser of the liability of an alien enemy on a contract made before the war in respect of a breach arising after war has begun No case is to be found to support the defendant's contention. The case of *Porter* v. *Freudenberg* (1) is inferentially opposed to it, as also is the case of *London and Northern Estates Co.* v. *Schlesinger*. (2) There an Austrian subject before the war took a lease of a flat for a term of years intending personally to reside there. On the outbreak of war an Order in Council prohibited him from residing in the district in which the flat was situate. In an action against him for the rent due at Lady Day, 1915, he unsuccessfully contended that his capability of personal residence in the flat was the basis of the contract, and that as that was rendered impossible the tenancy was extinguished. It never occurred to his counsel or to the Court to take the point that as the rent was not due till after the commencement of the war the right of action was suspended.

Ernest Pollock, K.C., and *Harold Morris*, for F. Curzon, third party. An alien enemy cannot serve a third party notice. "When once hostilities have commenced he cannot, so long as they continue, be heard in any suit or proceeding in which he is the person first setting the Courts in motion": *Porter* v. *Freudenberg*. (3) The claim of an indemnity against the third party is quite a distinct proceeding from that of the plaintiff's claim for rent, and in respect of it the defendant must be regarded as the person first setting the Court in motion.

Graham Mould for J. H. Leigh, third party.

RIDLEY J. In this case the action is brought by the plaintiffs to recover three months' rent of the Prince of Wales' Theatre at 500*l.* a month, the rent having become due in the months of June, July, and August, 1915. The defendant is an alien enemy. He counterclaims for certain deductions from the rent which by the terms of the lease he was to be allowed and which had not been allowed to

(1) [1915] 1 K. B. 857. (2) Ante, p. 20.
(3) [1915] 1 K. B. 857, at p. 884.

him. He also contends by way of defence that as an alien enemy he cannot during the continuance of the war be sued in respect of this rent, which did not accrue due until after the war began. He further sets up a claim against third parties claiming that if he is liable for the rent to the plaintiffs the third parties are liable to indemnify him. Mr. Heber Hart has argued, with reference to the liability of an alien enemy to be sued, that a distinction is to be drawn between a case in which the alleged course of action arose before and one in which it arose after the war began. He admitted that if the rent sued for had been due before the commencement of the war the defendant could have been sued for it, but he said that as it was not due until after the war had begun the right of action is suspended during the continuance of hostilities. I seek in vain in the cases cited for any authority for such a proposition; indeed, it appears to me to be wholly contrary to reason and I must reject it. I think the defendant is liable to be sued for the rent which became due in June, July, and August, 1915, notwithstanding the fact that he is an alien enemy. He is, however, entitled to set up in answer to the claim any matter which can properly be treated as matter of defence, because, as was said by Lord Reading C.J. in *Porter* v. *Freudenberg* (1), "To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's Courts in the administration of justice." But does that right of setting up a defence include the right to take third party proceedings? I think not. For the defendant is the person first setting the Court in motion in respect of the third party proceedings, and (to quote again from the same judgment) "When once hostilities have commenced he cannot, so long as they continue, be heard in any suit or proceeding in which he is the person first setting the Court in motion." No doubt the third party proceedings are necessary for a proper presentment of the defendant's whole case relating to the liability alleged, but not for a presentment of his defence to the plaintiffs' claim. They are quite independent of such defence. I must therefore hold that the defendant is not entitled to maintain these proceedings against the third parties. [The judge then proceeded to deal with the defendant's counter-claim for deductions,

(1) [1915] 1 K. B. 857.

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and held on the facts that the counter-claim failed.] My judgment therefore must be for the amount claimed.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Valpy, Peckham & Chaplin.*
Solicitors for defendant: *Hutchison & Cuff.*
Solicitor for Leigh: *Cecil F. J. Jennings.*
Solicitors for Curzon: *Wilkinson, Howlett & Wilkinson.*

J. F. C.

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Nov. 2, 3.

RUOFF *v.* LONG & CO.

Negligence—Liability—Intervening Act of Third Party—Highway—Motor left unattended.

A person lawfully leaving his property unattended in a highway must take reasonable means to prevent such mischief as he ought to contemplate as likely to arise from his user of the highway. He is not liable for damage caused by his property through such interference of third persons as he is not bound to anticipate.

The defendants' servants momentarily left stationary but unattended in a highway a steam motor lorry. In order to start the lorry it was necessary to withdraw a hand-pin from the gear lever and then to move that and two other levers. Two soldiers seeing the lorry mounted it. One tried but failed to set it in motion. The other succeeded in starting it backwards so that it ran into the plaintiff's shop front and did damage for which the action was brought:—

Held, that there was in the circumstances no evidence of negligence in leaving the lorry unattended; and, secondly, assuming that there was negligence, that there was no evidence that it caused the damage.

APPEAL from the county court of Hampshire holden at Portsmouth.

The defendants, who were brewers, used a steam lorry weighing five tons for the purpose of delivering beer from their premises to various public-houses served by them. On the occasion in question beer was being delivered at the North Pole, a public-house in London Road, Portsmouth, from the lorry, which was loaded with

beer barrels full. There were three men on the lorry, the driver, the steersman, and a drayman who had charge of and assisted in delivering the beer. The engine was fitted with three levers—the gear lever, which caused the gear to engage; the reversing lever, which impelled the lorry forwards or backwards or rendered it immovable; and the starting lever. To the gear lever there was a hand-pin for fixing the lever in a neutral position, i.e., one in which the gear was disengaged. The reversing lever was a self-locking lever. While this lever was in a neutral position the engine could not be started. The driver disengaged the gear and fixed the gear lever with the hand-pin. Thus in order to start the engine four operations were necessary. First, the hand-pin must be withdrawn from the gear lever; secondly, the gear lever must be actuated so as to engage the gear; thirdly, the reversing lever must be moved from the neutral position; and fourthly, the starting lever must be put in action. The lorry was left momentarily unattended while the three men were delivering the beer. Two soldiers approached. One of them mounted the engine, occupied the driver's seat, and attempted to move the levers, but failed. The other then mounted the driver's seat and succeeded in moving the levers. The lorry began to move backwards; then it ran across the street and into the plaintiff's shop, where it did the damage complained of.

The county court judge gave judgment for the plaintiff upon the grounds stated in the following extract from his judgment:—

"It is said on the part of the defendants that no accident at all would have happened if it had not been for the intervention of these third parties, these two soldiers. That is true, but then comes the question, be it so, does that fact preclude the plaintiff from recovering damages? I do not think that it does, and I think that the authorities, or at all events some of the authorities, support me in that position, because it is said that if a man chooses to leave a dangerous thing about in such a position that somebody else by interfering and meddling can do damage, the original person who leaves the particular thing about is liable to damages, and I think that law is applicable to these circumstances. The defendants left their engine, no doubt as a matter of fact it was left alone in a safe position; but the two soldiers come along like ordinary boys, light-hearted and mischievous; one of them gets up into the

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engine and starts it. He does in fact what is done in two or three of the cases that have been cited in which it was held that notwithstanding the interference of a third party the original defendant who left the thing and gave the opportunity for the wrongful act of the third person was a person liable, and in that view of the law my judgment must be for the plaintiff."

The defendants appealed.

S. H. Emanuel, for the defendants. There is no evidence of negligence on the part of the defendants. The county court judge has laid upon them the duty appropriate to the owner of a dangerous article, such as a loaded gun—*Dixon* v. *Bell* (1)—or an explosive—*Parry* v. *Smith* (2), but inapplicable to the present case. A steam lorry standing at rest requiring the movement of three levers before is can be set in motion is not a dangerous article, and its owner is not liable to do more than take reasonable means to prevent danger from circumstances which a reasonable man would anticipate: *Wheeler* v. *Morris*. (3) No reasonable man would anticipate that two soldiers would mount the engine, operate three levers, and so start the lorry.

Secondly, assuming that it was an act of negligence to leave the engine unattended, yet the chain of causation was broken by "the conscious act of another volition" in the words of Lord Dunedin in *Dominion Natural Gas Co.* v. *Collins*. (4) There are some independent acts which no one can guard against: *Rickards* v. *Lothian*. (5) The act of the defendants was not an effective cause of the subsequent injury: *Engelhart* v. *Farrant* (6); *McDowall* v. *Great Western Ry. Co.* (7)

du Parcq, for the plaintiff. The owner of an article likely to do serious damage if set in motion owes a duty to be careful in his user of it. If he has reason to suppose that there are a number of careless and thoughtless or mischievous persons in the neighbourhood he is bound to contemplate that they will act according to their character. If they do he cannot claim exemption from liability

(1) (1816) 5 M. & S. 198.
(2) (1879) 4 C. P. D. 325.
(3) (1915) 84 L. J. (K.B.) 1435.
(4) [1909] A. C. 640.
(5) [1913] A. C. 263.
(6) [1897] 1 Q. B. 240.
(7) [1903 2 K. B. 331.

on the ground that the conscious act of another volition has intervened between his negligence and the ensuing damage: *Illidge* v. *Goodwin* (1); *Engelhart* v. *Farrant*. (2) In *Mann* v. *Ward* (3) the owner of a cab was held not liable for an accident caused by an unauthorized person mounting the driver's box and starting the cab while the driver was asleep inside it. That decision was adversely commented on in *Engelhart* v. *Farrant*. (2) *Dixon* v. *Bell* (4), *Lynch* v. *Nurdin* (5), and *Clark* v. *Chambers* (6) are to the same effect and show that the intervening conscious act of another volition is not the test of the liability of the defendant. The test is what a reasonable man would contemplate in the circumstances. That is a question of fact. In certain circumstances it might be a reasonable precaution for the owner of a steam lorry to see that it was not left unattended. Whether those circumstances exist is a matter of fact. The county court judge is the judge of the facts. His finding may not commend itself to this Court, but that is no reason for overruling it if there is any evidence to support it. The county court judge speaks of the soldiers "like ordinary boys, light-hearted and mischievous." If there were many such persons in Portsmouth, can it be said that to leave the lorry unattended could not be evidence of a want of reasonable care? The presence of such persons, the number present, and the reasonable precautions desirable in consequence thereof are matters for the county court judge and not for this Court.

Emanuel in reply. A county court judge's findings of fact are binding only if he has laid down the true proposition of law. In the present case he has not done this, and therefore his findings of fact may be disregarded. There must be some evidence to support the findings: *Wheeler* v. *Morris*. (7)

AVORY J. In my opinion this appeal should be allowed. There are two questions to be determined—first, whether there was any evidence of negligence on the part of the defendants; secondly, whether there was any evidence that the negligence (if any) was an

(1) (1831) 5 C. & P. 190.
(2) [1897] 1 Q. B. 240.
(3) (1892) 8 Times L. R. 699.
(4) 5 M. & S. 198.
(5) (1841) 1 Q. B. 29.
(6) (1878) 3 Q. B. D. 327.
(7) 84 L. J. (K.B) 1435.

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effective or proximate cause of the injury or damage to the plaintiff. The county court judge, who gave judgment for the plaintiff, has given no express finding upon either of these two questions, although the points with which he had to deal were plainly brought to his attention.

The plaintiff must establish that it was negligence on the part of the defendants' servants to leave this machine unattended in the public highway. In my judgment the facts in this case do not afford any evidence of such negligence. This is not the case of a horse left unattended in the street which may start of its own accord, and which, however quiet, may yet be startled by a sudden noise or other cause accidental or intentional. It is impossible to say that those who leave standing unattended in a road a machine which will not move unless some person intentionally puts it in motion are prima facie guilty of negligence. But beyond this, in the present case, even assuming that such conduct amounts to negligence, there is the further question whether that negligence was an effective or proximate cause of the injury. Here again the county court judge has not come to any definite conclusion of fact; at any rate no such conclusion appears on his notes. To determine whether this negligence (if any) was an effective or proximate cause of the damage the question to be answered is this: Admitting that the accident would not have occurred but for the intervention of a third person, was such an intervention a thing which the defendants as reasonable men ought to have anticipated? If it was, then of course it is no answer to say that it was not their original negligence which caused the accident; the intervention is one link in the chain of causation and they are responsible. That leads to the question whether the defendants, assuming that they were guilty of negligence in leaving the lorry unattended, ought as reasonable men to have anticipated that soldiers or other persons would mount the engine, pull out the safety-pin, manipulate three different levers, and so set the lorry in motion. It cannot be said that any reasonable man ought to have anticipated such a set of circumstances; in other words, there was no evidence on which this or any other Court could come to the conclusion that this accident ought to have been anticipated. No evidence of any similar accident was tendered, and no evidence that soldiers or sailors in Portsmouth are addicted to pranks of this kind. The

case is not analogous to those where the intervention of a child with a machine or vehicle has been held not to constitute an excuse. Nor is it a case of a dangerous article left lying about, as in *Dixon* v. *Bell* (1), or of chevaux de frise obstructing a highway and likely to be interfered with, as in *Clark* v. *Chambers*. (2) Those cases were decided on the ground that the defendant had in each case left a dangerous or noxious thing in such a position that injury was likely to arise from interference with it. It is evident from the latter part of his judgment that the county court judge treated the present case as one of that class. But it is not such a case. "Dangerous" is not the word whereby to describe a machine which cannot move by mere accident, but only after a series of operations so complicated as to be beyond the power of a person unacquainted with the mechanism. In this case the first soldier failed to put the machine in motion.

The argument which required most consideration was that in cases of this sort it is a question of fact whether a reasonable man ought to anticipate the intervention which ultimately produces the damage. If on the evidence in this case there had been an express finding of fact that this accident ought to have been anticipated by a reasonable man, there would have been one short answer to it, namely, that there was no evidence to support it. To press that finding upon the Court is to invite us to repeat the mistake which must be taken to have been made in *Wheeler* v. *Morris* (3), a case which I may with advantage refer to here. The action was brought against a shopkeeper who had a sun blind projecting from the front of his premises over the footpath of the street. Two men were passing along the street. One jumped on the back of the other so as to reach the rod or arm of the blind, hung from it, and brought it down upon the plaintiff, who was passing the shop. The blind was an ordinary blind, fastened in the ordinary way, and in good condition; yet even so it would have been possible to fix it more securely by screws with nuts instead of by nails. The county court judge found as a fact that similar accidents had happened to similar blinds by reason of persons jumping up and pulling them down, and that the defendant had not discharged the

(1) 5 M. & S. 198. (2) 3 Q. B. D. 327.
(3) 84 L. J. (K.B.) 269, 1435.

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duty imposed upon him to have the blind so sufficiently fixed and secured as to prevent its being brought down upon persons using the highway by the action of a third person, even though mischievous, inasmuch as the defendant should have contemplated the possibility of such action. On appeal the case came before me and my brother Rowlatt. (1) In giving judgment I said: "This case is to my mind a difficult one to decide on account of the necessity of preserving the distinction between the functions of this Court and those of the county court judge. I have come to the conclusion that the real question we have to consider is whether there was any evidence upon which the county court judge could come to the conclusion that the defendant ought to have contemplated the possibility of such acts on the part of third persons as were committed by the two men in this case, and the consequential risks to persons using the highway. If I were asked, on the note we have of the evidence, for my own conclusion, I should say that there was no evidence upon which it would be reasonable to hold that the defendant ought to have contemplated these acts. But on the other hand it is quite possible that the other view is right. There was evidence that similar accidents had happened to similar blinds in consequence of people jumping up and catching hold of them. If that is so, the only question is whether every person who has such sun blinds ought to contemplate such accidents happening by reason of persons jumping up and catching hold of them. If such an inference can be drawn from this evidence, the county court judge was justified in holding that the defendant ought to have known of this liability and guarded against it." I thought the appeal failed because I could not say that the county court judge was wrong on this question of fact. Rowlatt J. was of the same opinion and for the same reasons. But the Court of Appeal (2) reversed our decision on the ground that there was no evidence that any person could reasonably have been held liable for not anticipating what had happened. Lord Cozens-Hardy M.R. said (3): "Now the principle of law cannot be better stated, I think, than it is by Vaughan Williams L.J. in the case of *McDowall* v. *Great Western Ry. Co.* (4), which was a case where a plaintiff

(1) 84 L. J. (K.B.) 269.
(2) 84 L. J. (K.B.) 1435.
(3) 84 L. J. (K.B.) at p. 1437.
(4) [1903] 2 K. B. 331, at p. 337.

when on a highway was injured by some trucks which had been mischievously set loose by boys on a railway, and sought to make the railway company liable for it. He says 'I do not think that Mr. Williams was wrong when he said that, in those cases in which part of the cause of the accident was the interference of a stranger or a third person, the defendants are not held responsible unless it is found that that which they do or omit to do—the negligence to perform a particular duty—is itself the effective cause of the accident. Bearing that in mind, it seems to me that in every case in which the circumstances are such that any one of common sense having the custody of or control over a particular thing would recognize the danger of that happening which would be likely to injure others, it is the duty of the person having such custody or control to take reasonable care to avoid such injury.' There is not a particle of evidence that in the circumstances of the present case anybody would ever think of guarding against the pulling down of a blind by the wrongful act of two grown men. I think it would be going further than any of the decisions, and would be wrong in principle to hold that this shopkeeper is liable for the consequences of the falling of this blind on to the plaintiff." Pickford and Warrington L.JJ. agreed. Pickford L.J. said (1): "I do not think myself that there was evidence to support these findings, or that what happened in this case was what ought to have been reasonably anticipated. Even although the defendant might have anticipated somebody jumping up at the blind in some way, I do not think there was any evidence to show, or on which it could be found, that he ought to have anticipated that two people would jump at it, and bring both their weights on it."

That shows that the Court of Appeal thought it their duty, notwithstanding that the county court judge had found that the defendant ought to have contemplated the intervention of third persons, to overrule that finding if in their view there was no evidence to support it. Following that, this Court ought to hold, even if we take the finding of the county court judge as a finding of fact, that it cannot stand if there is in our view no evidence to support it.

It is not necessary to discuss the question whether, there being an initial act of negligence, the intervening act of third persons of

(1) 84 L. J. (K.B.) at p. 1439.

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full age and discretion which is the proximate cause of the subsequent mischief affords of itself an answer to an action. Apart from the authority of *McDowall* v. *Great Western Ry. Co.* (1), the cases of *Dominion Natural Gas Co.* v. *Collins* (2) and *Rickards* v. *Lothian* (3) are both decisions in favour of the view that such an act would be an answer if the person originally negligent could not have guarded against it. In *Dominion Natural Gas Co.* v. *Collins* (4) Lord Dunedin said: "If the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail."

Whether in all cases the conscious act of another volition breaks the chain of causation between an initial act of negligence and the subsequent injury need not now be considered. In the present case there was the conscious act of another volition, but there was no initial act of negligence. The appeal must be allowed and judgment entered for the defendants.

LUSH J. I agree that there should be judgment for the defendants. The county court judge based his decision on this ground:—"If," he said, "a man chooses to leave a dangerous thing about in such a position that somebody else by interfering and meddling can do damage, the original person who leaves the particular thing about is liable to damages." I agree. If this motor lorry could be properly described as a dangerous thing, then the defendants, if they had placed it on the highway, would be taken to contemplate that persons lawfully using the highway might remove it; and if in the course of moving it these persons caused damage to a third person, the defendants who originally caused the obstruction would be liable. In *Clark* v. *Chambers* (5) Cockburn C.J. said: "A man who unlawfully places an obstruction across either a public or private way may anticipate the removal of the obstruction by some one entitled to use the way, as a thing likely to happen; and if this should be done, the probability is that the obstruction so removed will, instead of being carried away altogether,

(1) [1903] 2 K. B. 331.
(2) [1909] A. C. 640.
(3) [1913] A. C. 263.
(4) [1909] A. C. 640, at p. 646.
(5) 3 Q. B. D. 327, at p. 338.

be placed somewhere near; thus, if the obstruction be to the carriageway, it will very likely be placed, as was the case here, on the footpath. If the obstruction be a dangerous one, wheresoever placed, it may, as was the case here, become a source of damage, from which should injury to an innocent party occur the original author of the mischief should be held responsible." In such a case the person who places a dangerous obstruction in the highway is guilty of an unlawful act, and it is impossible to say that because there is an intervening act of a third person therefore there can be no real connection between the original act and the mischief. There is a connecting link, and the chain of causality is unbroken because he who obstructs a highway must anticipate that persons hindered in their use of the highway will place the obstruction elsewhere.

But in the present case there is no ground for saying that the defendants placed a dangerous thing or an obstruction upon the highway, or in any sense used the highway unlawfully. They left a motor lorry in the street for a few minutes. It could not start of itself. In leaving it standing in the street for that short time they did nothing unlawful. Then what is the duty of a person situated as the defendants were? He must take reasonable means to prevent such mischief as he ought to contemplate as likely to arise from his user of the highway. As a matter of fact the county court judge did not find that this accident was likely to arise from the defendants' user. If he had so found I agree that there was no sufficient evidence to support the finding. There would have been no danger if these two persons had not by their irresponsible acts converted into a source of danger a thing which in itself was perfectly safe and could do no harm to anybody. We need not go so far as to hold that a person lawfully leaving a vehicle standing unattended in a highway can in no circumstances be held responsible for damage through the intervening act of a third party. The circumstances might be such that he ought to recognize that he was offering a temptation or invitation to another to set the vehicle in motion and that danger might result to third persons. The chain of causality may be complete although a link in the chain is the intervening act of a third person. But the act which causes the mischief must be one which he would properly anticipate. In *Latham* v. *Johnson* (1) Hamilton L.J.

(1) [1913] 1 K. B. 398, at p. 413.

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states a rule which he says is as old as *Scott* v. *Shepherd* (1), namely, that a person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another may be answerable for the resulting injury, even though but for the intervening act of a third person that injury would not have occurred. The Lord Justice proceeds: "Children acting in the wantonness of infancy and adults acting on the impulse of personal peril may be and often are only links in a chain of causation extending from such initial negligence to the subsequent injury. No doubt each intervener is a causa sine qua non, but unless the intervention is a fresh, independent cause, the person guilty of the original negligence will still be the effective cause, if he ought reasonably to have anticipated such interventions and to have foreseen that if they occurred the result would be that his negligence would lead to mischief." That indicates that a person who so leaves his property will not be responsible if the mischief is created by a fresh, independent cause, and that a fresh, independent cause may be one which in the circumstances he is under no obligation to contemplate. Such a cause might be the mischievous act of a third person making that dangerous which of itself is innocuous. The observations of Lord Dunedin in *Dominion Natural Gas Co.* v. *Collins* (2) tend in the same direction. After dealing with cases of dangerous articles such as firearms, poisons, and explosives, Lord Dunedin said: "On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail." It may be difficult sometimes to say whether in the circumstances a fresh, independent act has interrupted liability for an initial act of negligence leading to subsequent injury. That question would have arisen in the present case if there had been any evidence that the act of the defendants' servants was negligent and that it was the proximate cause of the injury to the plaintiff. But as it is the question need not be considered. It is enough to say that there is here no evidence to support a finding, if there had been one, that the defendants' servants committed any initial act of negligence or failed to exercise reasonable care towards the plaintiff, and that

(1) (1773) 3 Wils. 403. (2) [1909] A. C. 640, at pp. 646, 647.

there is no evidence that, assuming they were negligent, the negligence was a proximate cause of the injury. The appeal must therefore be allowed and judgment entered for the defendants.

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Appeal allowed.

Solicitors for appellants: *Barlow, Barlow & Lyde, for Lamport, Bassitt & Hiscock, Southampton.*

Solicitor for respondents: *Edgar Bechervaise, Portsmouth.*

W. H. G.

J. R. MUNDY, LIMITED *v.* THE LONDON COUNTY COUNCIL.

1915

Nov. 23.

County Court—Practice—Payment into Court—Notice denying Liability—Action of Negligence—Admission of Negligence—Denial of Damage—Form of Notice—County Court Rules, 1903 *and* 1914, *Order* IX., *r.* 12.

The plaintiffs claimed damages in the county court for injury to their horse caused through the negligence of the defendants' servant. The defendants paid into Court under Order IX., r. 12, of the County Court Rules, 1903 and 1914, a sum of 40*l.* with the following notice:—"Take notice that the defendants admit that the accident was caused through their negligence, but that they deny the alleged damage, and, whilst in this manner denying liability, they bring into Court the sum of 40*l.*, and 2*l.* 9*s.* 10*d.* in respect of costs, and say that this sum is sufficient to satisfy the plaintiffs' claim."

The plaintiffs recovered the amount paid into Court and no more:—

Held, that, damage being the gist of the action, the notice admitting negligence but denying damage was a valid and proper notice denying liability, and that the defendants should have the costs of the action incurred after the date of the payment into Court.

Critchell v. *London and South Western Ry. Co.* [1907] 1 K. B. 860 distinguished.

APPEAL from the Lambeth County Court.

The plaintiffs' particulars of claim alleged that on December 18, 1914, at about 6.15 P.M., a horse the property of the plaintiffs

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was being driven along Walworth Road, when at a spot opposite Liverpool Street a tramcar the property of the defendants, and driven by one of their servants, came up behind and collided with the plaintiffs' horse and caused it to bolt, whereby it was injured; and that the tramcar collided with the horse owing to the negligence of the driver.

The plaintiffs claimed 70*l.* damages.

The defendants under Order IX., r. 12 (1), of the County Court Rules, 1903 and 1914, paid the sum of 40*l.* into Court with a notice denying liability in the following form:—

"Take notice that the defendants admit that the accident was caused through their negligence, but that they deny the alleged damage, and, whilst in this manner denying liability, they bring into Court the sum of 40*l.*, and 2*l.* 9*s.* 10*d.* in respect of costs, and say that this sum is sufficient to satisfy the plaintiffs' claim."

The plaintiffs recovered the amount paid into Court and no more. The defendants claimed the costs of the action. The plaintiffs contended that the payment into Court was invalid on the ground that the notice admitting negligence and denying liability was contradictory and inconsistent.

The county court judge held that the notice was a sham notice and invalid on the authority of *Critchell* v. *London and South Western Ry. Co.* (2) He therefore allowed the plaintiffs the costs of the action.

The defendants appealed.

Craig Henderson, for the defendants. The county court judge was wrong in holding that this notice was contradictory. An

(1) County Court Rules, 1903 and 1914, Order IX., r. 12: "(1.) A defendant who desires to pay money into Court pursuant to s. 107 of the Act shall pay the same five clear days at least before the return-day. Every such payment shall be taken to admit pro tanto the claim or cause of action or complaint in respect of which the payment is made, unless the defendant at the time of paying the money into Court files with the registrar a notice according to the form in the Appendix, stating his name and address, and further stating that notwithstanding such payment the defendant denies his liability. . . . . The defendant must also pay into Court, in respect of the Court fees and solicitor's costs (if any) entered on the summons, a sum proportionate to the amount paid in in respect of the claim . . . ."

(2) [1907] 1 K. B. 860.

action for damages caused by the negligence of the defendants' servant is not an action of trespass, which would be actionable per se, but is one of those actions on the case—*Gordon* v. *Rolt* (1)—in which damage is the gist of the action: Bullen and Leake, Prec., 3rd ed., pp. 7, 12, 368; Pollock on Torts, 9th ed., p. 190. It follows that to deny damage is to deny liability. Therefore the notice is a notice denying liability. On the other hand, for the same reasons negligence without damage gives no cause of action. Therefore to admit that an accident took place through the negligence of the defendants' servant is not to admit liability. Consequently the notice denies but it does not admit liability. It is therefore a good and valid notice. The county court judge has likened this case to that of *Critchell* v. *London and South Western Ry. Co.* (2), where the defendants, having paid money into Court with a denial of liability, wrote a letter to the plaintiff's solicitor to be read in Court informing him that the denial was merely technical to prevent him from taking the money out of Court, and that at the trial they did not intend to put the plaintiff to the expense of establishing a cause of action. That defence was held to be a sham and an abuse of the process of the Court. The present case bears no resemblance to it. There is nothing contradictory in the defendants admitting that their servant was negligent and admitting that through that negligence a horse was injured, but denying that the horse was of the value alleged by the plaintiffs and that it was the plaintiffs' horse. The plaintiffs must establish negligence and damage. There is nothing inconsistent in admitting the one and denying the other.

Doughty, for the plaintiffs. The county court judge has held that this notice is a mere sham.

[LUSH J. The time to decide that question is before and not after trial.]

There is enough on the face of this notice to show that it is nothing but a subterfuge. Damages need never be denied, but are taken to be in issue unless admitted. There is no substance in the point that to deny damage is to deny liability. Where a pleading is a mere sham it may be struck out: *Remmington* v. *Scoles* (3); *Critchell* v. *London and South Western Ry. Co.* (2); so also where it is

(1) (1849) 4 Ex. 365. (2) [1907] 1 K. B. 860.
(3) [1897] 2 Ch. 1.

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inconsistent and contradictory: *Hubback* v. *British North Borneo Co.* (1); *Chapman* v. *Westerby.* (2)

This is in truth an action of trespass. A master is liable for wrongs committed by his servant within the scope of his employment. There is no reason why trespass should be an exception to this rule. If so, the defendants are liable without proof of damage: *Smith* v. *Thackerah* (3); and a denial of damage is not a denial of liability.

Craig Henderson in reply.

AVORY J. The county court judge has decided that the money paid into Court in this case was not paid in under any legal process known to the law. On that ground he has held that it was equivalent to no payment at all and has deprived the defendants of the costs of the action, which they say they ought to have seeing that the judge assessed by way of damages the actual sum paid into Court. In my opinion the learned judge was wrong in holding that this money was not paid in under any legal process. Order IX., r. 12, of the County Court Rules, 1903 and 1914, has the force of an enactment enabling a defendant to pay money into Court with a denial of liability.

In this case the plaintiffs claimed damages for an injury to their horse caused by the negligence of the defendants' servant. It cannot be denied that the action was an action on the case, not an action of trespass. The particulars of claim alleged that the plaintiffs' horse was being driven along the road and that a tramcar the property of the defendants and driven by their servant came up behind and collided with the plaintiffs' horse, causing it to bolt and to sustain the injuries complained of. There is no suggestion of any cause of action other than an action of negligence.

The defendants within the time provided by Order IX., r. 12, of the County Court Rules paid 40*l.* into Court with a notice, which was duly filed with the registrar and was in these words: [The learned judge read the notice set out above, and proceeded:]

The county court judge has held, on the authority of *Critchell* v.

(1) [1904] 2 K. B. 473. (2) [1914] W. N. 64.
(3) (1866) L. R. 1 C. P. 564.

London and South Western Ry. Co. (1), that this notice was not in compliance with Order IX., r. 12, in that it was not a denial of liability; indeed I think he held that it was an admission, and therefore not a denial, of liability; but it may be that he intended to hold that it was in itself inconsistent and contradictory, being at once an admission and a denial of liability. If that were so *Critchell* v. *London and South Western Ry. Co.* (1) would clearly apply. In that case the defendants at the time of delivering their defence denying liability wrote a letter which they proposed to read at the trial to the effect that their denial was merely technical and that they did not intend to put the plaintiff to the expense of establishing their liability. In these circumstances the Court held that the defence was a sham and that the defendants could not have the benefit of the rule enabling them to pay money into Court with a denial of liability. In my opinion the county court judge was wrong in holding that this notice was a sham within the decision of that case. It is clear from a passage in Pollock on Torts, 9th ed., p. 190, which is supported by ample authority, that the plaintiffs cannot recover without proving actual damage suffered by the alleged negligence of the defendants' servant. That being so, the defendants, though they admit that the accident was caused through the negligence of their servant, yet deny that the plaintiffs have suffered any damage, and so they put in issue one of the matters which had to be established in the plaintiffs' favour before they could recover.

Secondly, this is not an admission of liability, because there is no admission that the horse was the property of the plaintiffs. That was an issue which had to be determined in favour of the plaintiffs. On both these grounds I think that the county court judge was wrong in construing this notice as an admission, and therefore not a denial, of liability. It is not necessary to advert to the reasons given by the county court judge for that decision. Nevertheless I may say that in construing this notice according to its true effect as a notice denying liability I see no hardship on poor litigants or advantage to rich litigants; and if I did I should not allow that to affect my judgment. The effect of Order IX., r. 12, is to enable a defendant to make an offer of settlement of the plaintiff's claim. The plaintiff,

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even though poor, is not thereby placed in a position of any hardship whatever. For these reasons I think that the appeal must be allowed; the order of the county court judge must be set aside, and the defendants must have the costs of the action from and after the date of the payment into Court.

LUSH J. I am of the same opinion. A defendant in the county court is entitled to pay money into Court either admitting or denying liability. If he pays in with a denial of liability the payment operates as an offer to compromise and settle the litigation. It is in effect an assertion that the plaintiff has no cause of action, but that for the sake of peace and quiet the defendant is willing to offer so much, which the plaintiff may accept or not as he pleases. The defendant must either offer a compromise or admit liability and merely raise the question of amount. If while saying that he denies liability he at the same time says that he admits liability, whether in the same notice or defence or in a contemporaneous document as in *Critchell* v. *London and South Western Ry. Co.* (1), he is not offering a compromise; he is admitting liability. The county court judge likened the present case to that case. I fail to see any resemblance. In the present case the defendants in their notice say they admit that their servant was negligent and that his negligence caused the accident. That is all they admit. They do not admit that the injured horse was the property of the plaintiffs, and they do not admit that the mere negligence of their servant causing an accident but not causing damage to the plaintiff entails liability upon them in such a case as this. In these circumstances the offer of a compromise, which is necessarily implied by payment into Court with a denial of liability, in no way contradicts or annuls the denial of liability. That being so, how can this be called a bad notice? The case of *Critchell* v. *London and South Western Ry. Co.* (1) was altogether different. In that case the defence of payment into Court without admitting liability was held to be a sham defence because by a letter sent with the defence the defendants admitted the cause of action and admitted that their defence was merely a technical plea. The Court of Appeal considered this an ingenious attempt to obtain the advantage

(1) [1907] 1 K. B. 860.

permitted to a defendant who bona fide denies liability by means of a pretended denial which was in substance an admission of liability.

One point I desire to emphasize. The bona fides of a notice of this kind must be tested at the time when the money is paid into Court, just as one tests a pleading in the High Court raising a similar issue. If the pleading is a sham it may be struck out on a summons in chambers. I am by no means satisfied that, if the defendant in a county court were to deliver a notice which could be shown to be a sham, the plaintiff might not go to the county court and have the notice set aside. However, be that as it may, the time to judge of such a notice is the time when the notice is given and the money paid into Court. To wait until the trial is over and so ascertain whether the defendant has in his notice denied a material fact which he knew he could not dispute, and from thence to conclude that his notice is a sham, is to apply the wrong test. A defendant is permitted to deny an allegation although he knows that it must be found against him. That is not the meaning of a sham notice within the decisions of *Remmington* v. *Scoles* (1) and *Critchell* v. *London and South Western Ry. Co.* (2) A sham notice is one which is an abuse of the process of the Court. There is no ground for saying that the notice in this case answers that description. For these reasons I agree that the appeal must be allowed.

Appeal allowed.

Solicitor for appellants: *Edward Tanner.*

Solicitors for respondents: *Clifford, Turner & Hopton.*

(1) [1897] 2 Ch. 1. (2) [1907] 1 K. B. 860.

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[IN THE COURT OF APPEAL.]

NEWSTEAD *v.* OWNERS OF STEAM TRAWLER LABRADOR.

Employer and Workman—Compensation—Seaman—Member of Crew of Fishing Vessel—Bonus on Value of Catch—Remuneration by Shares in Profits or Gross Earnings—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58) *s.* 7, *sub-s.* 2.

A claim for compensation by the widow of a member of the crew of a fishing vessel, which was lost with all hands, was resisted by the owners on the ground that the deceased was remunerated by a share in the profits or gross earnings of the vessel within s. 7, sub-s. 2, of the Workmen's Compensation Act, 1906, and therefore that the Act did not apply to him. He was employed as chief engineer on board a steam trawler at a fixed weekly wage of 2*l.* 5*s.* It was the custom of the owners when the gross earnings of the boat exceeded 100*l.* for any one trip (each trip being usually of about a week's duration) to allow a sum of 2*l.* by way of bonus, of which 1*l.* went to the captain and 2*s.* 6*d.* to each of the remaining eight members of the crew. If the gross earnings of the boat exceeded 125*l.* the bonus was proportionately increased and so on, but it was not further increased if the gross earnings realized more than 175*l.* :—

Held, that the bonus was not a share in either the profits or the gross earnings of the vessel, but was an additional sum for wages determined by the amount of the gross earnings. The applicant was therefore entitled to compensation.

Costello v. *Owners of Ship Pigeon* [1913] A. C. 407, *Burman* v. *Zodiac Steam Fishing Co.* [1914] 3 K. B. 1039, and *Stephenson* v. *Rossall Steam Fishing Co.* (1915) 8 B. W. C. C. 209 distinguished.

Appeal from an award of the judge of the Great Yarmouth County Court, sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was the widow of Albert Newstead, who at the time of his death was in the employ of the appellants as chief engineer of their steam trawler *Labrador*. The vessel sailed from Lowestoft on January 23, 1915, with Newstead on board. Nothing had since been heard of her, and it was assumed that she was lost with all hands, having probably struck a floating mine in the North Sea. The widow, Hannah Maria Newstead, applied to the county court for an arbitration for recovery of compensation under the Act.

The deceased entered into the service of the appellants in February, 1914, on a running agreement which lasted six months. He signed on upon a fresh running agreement dated January 1, 1915, as engaged in trawling at a weekly wage of 2*l.* 5*s.* In the column of the running agreement dealing with "share of fishing profits" there was an entry of "none" against the name of the deceased. He was not entitled to what is known in the fishing business as "stocker" or "liver money," but was entitled at the end of each voyage to a bonus on the following scale:—If the vessel made 100*l.* (i.e., caught 100*l.* worth of fish), 1*l.* to the skipper and 2*s.* 6*d.* to each of the crew; if it made 125*l.*, 30*s.* to the skipper and 3*s.* 9*d.* to each of the crew; if it made 150*l.*, 2*l.* to the skipper and 5*s.* to each of the crew; and if it made 175*l.*, 2*l.* 10*s.* to the skipper and 6*s.* 3*d.* to each of the crew. No bonus was payable if the catch realized less than 100*l.*, and the bonus was not increased if more than 175*l.* was realized. The bonus was generally, within twenty-four hours of the vessel coming into port, paid over to the skipper in a lump sum and divided by him among himself and the crew. The method pursued by the appellants to find the gross earnings or takings of their boats was that as soon as possible after the vessel came into port the whole of the catch was sorted out and sold. From the gross result were deducted various items of expenditure. If the catch realized 100*l.* and upwards the "bonus" to the skipper and crew was not deducted from the gross sum, nor was it entered in the appellants' settling sheets. It was treated as a gratuity to the crew on the part of the appellants, and was not included in the running agreement or made a matter of contract between the crew and the owners, and could be withheld or granted by the appellants as they thought fit.

The appellants as a matter of practice or custom of their firm paid the bonus or gratuity as an incentive to the crews on board their vessels to work well together. No custom of making such a gratuity was proved to exist in the port of Lowestoft. It appeared that the total amount paid by the appellants to Newstead by way of bonus from February 9, 1914, to January 23, 1915, was 3*l.* 4*s.* 6*d.*, during which period his wages amounted to upwards of 100*l.*

In their answer to the application the appellants denied their obligation to make compensation on the ground (inter alia) that

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the deceased's employment was not an employment to which the Act applied, he being a member of the crew of a fishing vessel remunerated by a share in the profits or the gross earnings of the vessel within s. 7, sub-s. 2, of the Workmen's Compensation Act, 1906. (1)

The county court judge found that the deceased was not remunerated by a share in either the profits or the gross earnings of the vessel. He was therefore entitled to the benefit of the Act, and compensation must be awarded to the applicant.

The owners appealed.

A. Neilson, for the appellants. On the evidence it is clear that this bonus was a share in the profits or gross earnings of the boat and that it formed part of the man's remuneration within s. 7, sub-s. 2, of the Act: *Costello* v. *Owners of Ship Pigeon* (2); *Burman* v. *Zodiac Steam Fishing Co.* (3) The share is not so small that the Court will not regard it. There was a definite bargain that the deceased should receive 2*s.* 6*d.* if 100*l.* was earned by the boat, and so on. That must be a share in the gross earnings. The bonus was a part of his remuneration. It was an extra bargain outside the original agreement. Even if it is a mere gratuity it is nevertheless part of the man's remuneration: *Skailes* v. *Blue Anchor Line* (4); *Stephenson* v. *Rossall Steam Fishing Co.* (5)

Clement Edwards, for the respondent, was not called upon.

LORD COZENS-HARDY M.R. The Act of 1906, which is now the governing statute, for the first time brought sailors and fishermen within the scope of the Workmen's Compensation Acts, but there is a qualification in s. 7 of the Act of 1906, which is the section which makes that Act apply to seamen. Sub-s. 2 of that section provides that "This Act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel." This sub-

(1) The Workmen's Compensation Act, 1906, s. 7, sub-s. 2, provides: "This Act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel."

(2) [1913] A. C. 407.

(3) [1914] 3 K. B. 1039.

(4) [1911] 1 K. B. 360.

(5) 8 B. W. C. C. 209.

section has given rise to a good deal of litigation. The English and Scottish Courts have taken different views upon it. In Scotland it has been held that the share must be a substantial part of the remuneration, and that the sub-section does not apply where the share is some very small proportion of the remuneration. But the House of Lords in *Costello* v. *Owners of Ship Pigeon* (1), following a decision of this Court, held that that was not so ; that it was quite sufficient to bring the proviso into operation if the man had a share in the profits or gross earnings of the vessel although the amount of his share was a very small proportion of his actual money remuneration. It has also been held by this Court that where stocker was given to the crew, or to a part of the crew, that brought the case within the proviso, because the stocker, which was part of the general catch of the trawler, was not treated like the ordinary fish which the trawler caught, but belonged to the crew or to some members of the crew. Originally I think the crew used to take the stocker themselves ; but then it was found more convenient that there should not be an actual division of the stocker made by the captain, but that the whole catch, including the stocker, should be sold by the owners and that the money received for the stocker should then be divided between the crew or certain members of the crew. In the case of *Burman* v. *Zodiac Steam Fishing Co.* (2) the net proceeds of the sale of the stocker were handed by the owners to the skipper, who divided them in such manner as was arranged between him and the crew. In both these cases there was manifestly sufficient to bring them within the proviso as to a share in the profits or the gross earnings of the working of the vessel. The question is whether, having regard to the circumstances, that can be said in the present case. It seems that by the custom of this firm and by the understanding and arrangement between the parties, if the vessel made 100*l.* the skipper was entitled to 1*l.*, and in that particular case each member of the crew was entitled to half a crown. If the vessel made more the skipper and crew were entitled to larger sums. Now what was the effect of that ? The bonus was not, as it seems to me, any part of the profits, nor was it a share in the gross earnings of the vessel. There was an obligation on the part of the owners of the trawler

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to pay the half a crown (to take that as one instance) in a certain event, which event was to be determined by the gross earnings of the vessel. I see no ground for holding that it was in any sense of the word a share of the gross earnings of the working of the vessel any more than the actual wages which were payable to the seamen could be treated as being a share of the gross earnings of the vessel, although the bonus as well as the wages would figure in the ship's accounts as against the receipts on the other side.

In my view this case is not within any authority binding us to say that the deceased was not entitled to the benefit of the Act. I agree with the decision of the learned county court judge. I think it was quite right, and the appeal, therefore, fails.

BANKES L.J. I agree. The question which the learned county court judge had to decide was as to what the contract of service in this particular case was, having regard to the fact that what was called a bonus of a sum of money was paid to members of the crew. The bonus was stated by a witness to be a bonus which was given when the vessel made 100*l.*, and if the vessel made more than 100*l.*, then the bonus was proportionately larger. That raised two questions which the learned judge had to decide, first of all, whether that bonus was one of the terms upon which the seaman was engaged in the sense that there was a contract on the part of his employers to pay him the amount, or whether it was a bonus in the sense of being a mere present. If the learned judge decided that it was a bonus in the sense that it constituted a term of the contract, then a second question arose as to whether the contract gave the applicant a right to a share in the gross earnings of the vessel within s. 7, sub-s. 2, of the Act of 1906, or whether it merely gave him a contractual right to a sum measured by those gross earnings. The learned county court judge has found in favour of the applicant on both grounds, as I understand him. He has found, in the first instance, that there was no obligation to pay this amount at all, that it was a mere gratuitous payment. If the case had depended upon that, I am not at all sure that I should have agreed with him in that view, having regard to the evidence; but assuming that a contract is made out between the employer and the employed to pay this so-called bonus, then is it a contract which gives the seaman a share

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in the gross earnings of the vessel, or is it a contract which merely gives him a right to a sum which is measured by the gross earnings? Upon that point I have no doubt whatever that the view of the learned county court judge in deciding as he did that this was a mere (if I may use the expression) branch of the seaman's wages was right, and that the evidence would not have justified him in coming to the conclusion that either the employer or the employed intended to contract or agree that the seaman should have any share in the gross earnings of the vessel. I think, therefore, that the appeal fails.

WARRINGTON L.J. I am of the same opinion. I will assume that the bonus in question was part of the man's remuneration, and that if that bonus had been in fact a share in the gross earnings the man would have been remunerated by such a share within the meaning of the section. But the question still remains, is the bonus a share in the gross earnings? In my opinion it is not. It is merely a further sum payable in addition to his wages in a certain event, namely, the gross earnings reaching or exceeding a particular sum. In my judgment that is not to say that the man is to receive a share in the gross earnings; it is merely to say that he is to receive an additional sum for wages determined by the amount of the gross earnings.

Appeal dismissed.

Solicitors for appellants: *Pritchard & Sons, for Wallace & Macfadzean, Sunderland.*

Solicitor for respondent: *Alexander Smith, for Humphrey de la Lynde, Great Yarmouth.*

G. A. S.

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[IN THE COURT OF APPEAL.]

HART *v.* CORY BROTHERS, LIMITED.

Employer and Workman — Compensation — Review — Termination — Incapacity arising from Accident—Concurrent Causes—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1 ; *Sched. I., pars.* 1 (*b*), 16.

In a claim for compensation under the Workmen's Compensation Act, 1906, it appeared that the claimant had lost the sight of his left eye by an accident and that afterwards the usefulness of his right eye was diminished by accident or disease :—

Held, that he was not entitled to treat the first accident as a concurrent cause of the incapacity caused by injury or disease to his right eye on the ground that the loss of the sight of the left eye made his incapacity greater than it would have been if he had retained the full use of his left eye. The claim for further compensation on account of the accident to the left eye could only arise if the failure of sight in the right eye had been caused by the accident to the other.

Held, further, that the existence of a suspensory award made no difference.

Hargreave v. *Haughhead Coal Co.* [1912] A. C. 319 applied.

The applicant in this case worked as a collier in the respondents' colliery. On January 1, 1912, he met with an accident, in consequence of which he lost the sight of his left eye. Liability was admitted and compensation paid by the respondents to the applicant at the rate of 1*l.* a week until May 11, 1912, when he resumed work underground and continued so working until August 24, 1912, at full wages. During that time he actually earned more money than before his accident. On August 24, 1912, he ceased working, alleging incapacity to work underground. From September 25, 1912, to February 6, 1913, he was at his own request employed by the respondents in work upon the surface at lower wages than he had earned underground, but without prejudice to a dispute between him and them as to his capacity to work underground. On February 6, 1913, he applied for compensation. The respondents resisted on the ground that the applicant had recovered from the incapacity caused by his accident and was capable of earning full wages. The county court judge found that he was so capable,

but, with the consent of the respondents, made a suspensory award for compensation at a penny a week.

From February 6, 1913, to February 3, 1914, the applicant worked underground, first for the respondents and afterwards for another colliery company, in both cases earning full wages. After the latter date, having in his right eye, which was not injured by the accident, some trouble which made him in his own opinion unfit to work underground, he applied for and obtained work on the surface for the second colliery company, at less than his underground wages. This continued until April, 1915, when he made an application to the county court judge for an increase of compensation.

At the hearing of this application there was evidence on both sides as to the unfitness of the applicant for work underground caused by the state of his right eye. It was admitted that he was suffering from inflammation of the optic nerve of his right eye, and there was some evidence that there was no connection between this inflammation and the accident to the left eye.

The county court judge referred the matter to the medical referee, who reported that the applicant was, owing to the condition of his right eye, quite unfit to work underground, but he did not make any report on the question whether that condition had any connection with the accident. The judge, having held some further communication with the medical referee, delivered his judgment in June, 1915, finding that the applicant was not fit to work underground, but that his condition was not caused by the accident, and therefore the applicant was not entitled to any increase of compensation.

The applicant appealed.

Parsons, K.C., and *Trevor H. Hunter*, for the appellant. Until the liability of the employers is terminated the workman is entitled to compensation based on any incapacity to earn his old rate of wages, provided he can show that otherwise he would have been able to earn the old rate of wages. The county court judge has held that but for the accident the appellant could have done his old work notwithstanding the disease and but for the disease he would have earned his old wages notwithstanding the accident; that the disease is the reason why he cannot do the old work; and as it was not due to the accident the compensation cannot be

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increased. But the learned judge ought to have taken into consideration the fact that the injury caused by the accident made the workman more susceptible. Suspensory awards originated with *Irons* v. *Davis & Timmins*. (1) The learned judge could not put an end to the compensation so long as the incapacity continued: *Nicholson* v. *Piper*. (2) The Act does not say that the incapacity must be the result of the accident only: *Lee* v. *William Baird & Co.* (3) The decision in *Noden* v. *Galloway* (4) referred to a case where there had been two accidents, and does not apply to the present case, where there has been only one accident followed by disease. An attack of disease does not disentitle the workman to compensation: *Harwood* v. *Wyken Colliery Co.* (5); *Quinn* v. *M'Callum*. (6) The learned judge relied on *Hargreave* v. *Haughhead Coal Co.* (7), but this is a question of fact, and there was no evidence to support the award. The application for a suspensory award was right: *Jones* v. *A. & G. Anderson* (8); *Jackson* v. *Hunslet Engine Co.* (9); but the learned judge was wrong in not increasing it.

Compston, K.C., and *Harold Morris*, for the respondents. The county court judge was right. He had to consider whether in 1912 there was such a change in the circumstances as justified an increase of the compensation. It was said that the claimant could no longer work underground and that his good eye was diseased. He did not prove that the disease was due to the accident. In fact he failed to show that "causal connection" which, according to *Hargreave* v. *Haughhead Coal Co.* (7), is necessary in such cases. That case precisely covers the case before the Court. *Irons* v. *Davis & Timmins* (1) established the liability of the employer to pay compensation if the workman could prove thereafter that some further incapacity had arisen from the accident. But in *Hargreave* v. *Haughhead Coal Co.* (7) the House of Lords held that on an application for such further compensation it was open to the arbitrator to find that the further incapacity was not caused by the accident.

(1) [1899] 2 Q. B. 330.
(2) [1907] A. C. 215.
(3) (1908) 1 B. W. C. C. 34.
(4) [1912] 1 K. B. 46.
(5) [1913] 2 K. B. 158.
(6) (1908) 2 B. W. C. C. 339.
(7) [1912] A. C. 319.
(8) [1914] W. N. 432; (1915) 8 B. W. C. C. 2.
(9) (1915) 8 B. W. C. C. 584; W. C. & Ins. Rep. 389.

The arbitrator did so find in that case and the House of Lords upheld his finding. There is the same finding here. The suspensory award was made with the employers' consent merely to meet a possible further incapacity caused by the accident. [They also referred to *London and North Western Ry. Co.* v. *Taylor* (1), affirmed sub nom. *Taylor* v. *London and North Western Ry. Co.* (2), and *Griffiths* v. *North's Navigation Collieries.* (3)]

Parsons, K.C., in reply. *Jones* v. *A. & G. Anderson* (4), in the House of Lords, shows that if the arbitrator thinks no further incapacity can arise from an accident he should not make a suspensory award. In this case there was a suspensory award, and that is conclusive that there was a possibility of further incapacity arising from the accident; there was no suspensory award in *Hargreave* v. *Haughhead Coal Co.* (5)

LORD COZENS-HARDY M.R. This appeal raises a question of importance which, but for a decision of the House of Lords, I should certainly have desired to take time to consider. [The Master of the Rolls stated the facts as above, down to the application of the workman for compensation in February, 1912, and continued:]

The learned county court judge upon that application found that he was able to work in the mine and made what is conveniently called a suspensory award of one penny a week and no more. That award was made, apparently, by reason of the consent or admission of the employers that they did not object to it. That being so, the learned judge was perfectly right, if I may say so, in accepting the offer of the employers, for the very obvious reason that when a man's eye is injured, although he may at the moment have so far recovered as not to be incapacitated from his work, it is common knowledge that there may be very serious consequences break out afterwards to that eye, and also, by reason of sympathy, to the other eye. All those contingencies and liabilities were left open, but nothing else. The workman went back to work again as a collier. He changed his employment. Then, in 1914, the sight of the other eye became rather bad, and he then became a surface labourer. In

(1) (1910) 4 B. W. C. C. 11.
(2) [1912] A. C. 242.
(3) (1912) 5 B. W. C. C. 21.
(4) [1914] W. N. 432; 8 B. W. C. C. 2.
(5) [1912] A. C. 319.

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April, 1915, he made the present application for a review of the penny a week award on the ground of trouble in his right eye. Evidence was given, and a medical referee was present, and the learned county court judge found, no doubt, on the advice of the medical referee, that although there was inflammation of the optic nerve in what I call the good eye, there was not any connection between that inflammation and the accident in January of 1912. That is a finding of fact which cannot be questioned. The damage to the good eye is something which is in no way connected with the accident, which happened in January, 1912, three years before this award. The learned judge finds, therefore, that the applicant is not now suffering from incapacity as the result of the accident in January, 1912.

I was struck, if I may be allowed to say so, with the very able argument of Mr. Parsons in support of the view that in the case of a man who has lost, by an accident arising out of his employment, one eye, he must always be in this position, that any injury to the other eye, although perfectly good at the time, must entirely incapacitate him from his full efficiency, and that, although the accident is not the direct cause of it, it may be a concurrent cause, for the fact that a man who has lost one eye is more seriously affected by an injury to the other eye ought to be had regard to, although the second injury was not attributable to the accident which affected the first eye. There is a good deal to be said for that view, but I do not think it would be right for me to express any opinion upon it. It seems to me that if we adopted that argument we should be deciding in the teeth of the views expressed by the House of Lords in the case of *Hargreave* v. *Haughhead Coal Co.* (1) As to the facts, I think that case is not distinguishable from this case; but I do not cite it so much for that as for the principles which are laid down by the three learned Lords who gave reasons for their decision. The head-note in that case is this: "Upon an application by employers for the termination of a weekly payment made by them on the footing of total incapacity to a workman who had lost an eye by accident arising out of and in the course of his employment, the arbiter found that the incapacity had ceased and that the workman was fit to resume his former work; that since the accident

(1) [1912] A. C. 319.

incipient cataract had appeared in his other eye; and that the cataract was not due to the accident:—Held, that on these findings the arbiter was right in ending the compensation." Lord Macnaghten says this (1): "There is nothing to connect the accident with the disease. That being so, it seems to me that it is impossible to say that the award ought to have been kept open, unless your Lordships are prepared to hold that when a man being gifted by nature with two organs of vision loses one, the award ought always to be kept open on the chance of his losing the other before he becomes unfit to work or is unable to earn his livelihood." Lord Atkinson says (1): "Now the compensation is given where the injury is caused by an accident arising out of and in the course of a man's employment, and it is in respect of that injury, and of that alone, that the workman is entitled to receive compensation. The function of the schedule is to supply a measure of damages for that compensation; but a man is not entitled to compensation for an injury not inflicted upon him by the accident with which he meets. If the argument of the appellant were well founded, then if a man loses one eye, inasmuch as if anything happens to the other eye he would become totally blind, the award must be for ever kept open in order to see whether that misfortune will ever befall him. If that were so, there would be no finality in such a case." Then a little further on in his judgment he says: "But it appears to me—taking the finding here to be that this cataract did not exist at the time the man sustained the injury to his right eye, but that it developed subsequently, coupled with the seventh finding, 'that the cataract in the left eye is not due to the accident'—that the award should not be kept open to meet the possibility of the consequences which may hereafter ensue." Lord Shaw takes the same view and says (2): "I think that the finding in head 7, 'that the cataract in the left eye is not due to the accident,' destroys all causal link of connection between that ailment and any accident arising out of and in the course of the employment. The causal connection having been thus destroyed, it appears to me that it would be straining the statute and contrary to its provisions to apply it to a case like the present." Lord Robson and Lord Loreburn concurred, without stating their views.

(1) [1912] A. C. 321. (2) [1912] A. C. 322.

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I thought it right to read the parts of judgments which I have read, because in dealing with this appeal I am doing that which I conceive to be my duty, honestly following that which I believe to be the result of a recent decision in the House of Lords, laying down the principles which seem to me to be applicable to the present case.

On the authority of that case, it seems to me that the learned judge was right in declining to review, but leaving the penny a week still standing. If a further injury should arise, either by the breaking out of inflammation in the injured eye, or by injury to the other eye by sympathy, then, under the existing penny a week award, it will be open to the man to apply for a review; but as matters now stand I think the learned judge was right in saying that he must not review the award by increasing it from a penny a week to some substantial sum.

The appeal fails and must be dismissed.

BANKES L.J. I agree. Mr. Parsons has submitted two propositions to us, as I understand; the first is: that where a man is maimed by the loss of an eye, or maimed as the result of any other accident arising out of or in the course of his employment, and his earning capacity in the open market is thereby affected, he may apply for and obtain a suspensory award on that ground, although the injury has not at the moment produced any loss of earnings. In support of that he has cited the recent case of *Jones* v. *A. & G. Anderson* (1) and the case in the Court of Appeal of *Jackson* v. *Hunslet Engine Co.* (2), and it seems to me that those authorities are ample justification for Mr. Parsons' first point. His second point, as I understand it, is this: that when once a man has obtained that kind of suspensory award founded upon that ground, he is entitled, if at some later stage disease or some subsequent accident produces loss of earnings which was contemplated at the time of the suspensory award, but had not at the moment occurred, to apply to have his case reconsidered under par. 16 of the First Schedule. I say nothing about that proposition. I do not think the matter is before us, and I do not think that, having regard to the decision of the House of Lords in *Hargreave* v. *Haughhead Coal Co.* (3), it is open to us to consider that,

(1) [1914] W. N. 432; 8 B. W. C. C. 2.
(2) 8 B. W. C. C. 584.
(3) [1912] A. C. 319.

and for this reason. It appears to me that Mr. Parsons has not established that he did obtain the kind of suspensory award which he is contending for. It appears to me, on the materials before us, that this particular point was not before the learned county court judge at the time he made the suspensory award, but that it was an entirely different point, and the suspensory award was made for the purpose of keeping open an entirely separate and distinct point, namely, whether or not the injury to this unfortunate man's eye might not extend to his sound eye. Of course, if that happened, the man's claim would be clear. There would be the direct causal connection that I think Lord Shaw refers to in the case of *Hargreave* v. *Haughhead Coal Co.* (1) That being so, it seems to me that the materials are not before us upon which it is open to us, having regard to the decision in *Hargreave* v. *Haughhead Coal Co.* (1), to consider or express any opinion upon that second very important point which Mr. Parsons has raised before us. I only say that because I do not wish it to be thought that anything I said negatives the possible effect of that point being successfully established in any other case in which the facts permit it to be put forward.

WARRINGTON L.J. I agree. The facts in this case are substantially identical with those in the case of *Hargreave* v. *Haughhead Coal Co.* (1), and if in that case the arbitrator was right in ending the compensation, I cannot see how the learned county court judge in the present case was wrong in refusing to award the increased compensation applied for.

With regard to the other point as to the effect of the declaration of liability, I only desire to add this. The declaration of liability, it seems to me, can only be effective as a declaration of liability to pay compensation under the Act, and if at any future time the workman should be able to establish that he is suffering from an incapacity resulting from the injury, having regard to the principles stated in the case of *Hargreave* v. *Haughhead Coal Co.* (1), then he would be entitled under that declaration to come to the Court to have compensation awarded to him. But in the present case the facts as found by the learned county court judge are identical with those in the case of *Hargreave* v. *Haughhead Coal Co.* (1), and, that

(1) [1912] A. C. 319.

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being so, at the present time the workman is not suffering from any incapacity resulting from the injury, and the declaration of liability has really nothing to do with the facts as they exist at the present time.

Appeal dismissed.

Solicitors: *Herbert G. Rastall, for A. Jestyn Jeffreys, Neath; Bell, Brodrick & Gray, for C. & W. Kenshole & Prosser, Aberdare.*

J. R. B.

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[IN THE COURT OF APPEAL.]

BURVILL *v.* VICKERS, LIMITED.

Employer and Workman—Compensation—Accident arising out of and in the Course of the Employment—Notice of Accident—Default in giving Notice—Employer prejudiced in his Defence—Evidence—Burden of Proof—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 1, 2.

A workman who was employed in a shell factory contracted blood poisoning from an abrasion on his finger, from which he died. There was no evidence as to the exact date on which he received the injury, and no notice of any accident was served upon the employers until after his death. He returned from his work on March 6, 1915, and according to his wife's evidence seemed very ill and went to bed. A doctor saw him the next day and found a poisoned wound on his finger, from the effects of which he died on March 14. His widow applied for compensation under the Workmen's Compensation Act, 1906, and stated the nature of the injury to be blood poisoning resulting from an accident to the deceased's hand on March 6. On the hearing of the arbitration it was contended that there was no evidence of the exact date of the accident, and that no notice of the accident had been given as required by s. 2 of the Act. There was no evidence that the employers were prejudiced in their defence by the want of notice. The county court judge, in giving his award, treated the points taken by the employers as purely technical, and held that death had resulted from an accident arising out of and in the course of the employment, and that the employers had not been prejudiced in their defence by the want of notice. He accordingly awarded compensation to the widow. On appeal by the employers:—

Held, that while the question of want of notice could not be treated as unimportant, yet in this case, as in *Hayward* v. *Westleigh*

Colliery Co. [1915] A. C. 540, there being no inherent probability from the facts that the employers would be prejudiced by the want of notice, the onus was shifted from the workman to the employers, and the Court would not interfere with the finding of fact by the county court judge that the employers had not been prejudiced.

APPEAL from an award of the judge of the Dartford County Court, sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicants were dependants of Alfred Burvill, deceased, who met with his death as the result of an alleged accident arising out of and in the course of his employment as a shell maker by the appellants, Messrs. Vickers, Limited.

The deceased had been employed by the appellants for six months prior to his death.

On the evening of March 6, 1915, he came home from his work, and according to the evidence of his widow seemed very ill and went to bed. He complained that his hands had been scratched and knocked about during his work. On March 7 a doctor was called in, who found that the man had a poisoned wound in the middle finger of his right hand. He died from blood poisoning on March 14. According to the doctor's evidence the poisoning had taken place about twenty-four hours before he saw the man, and could not have resulted from an accident on March 6, but probably from an accident two or three days before.

In the application for arbitration the nature of the injury was stated to be blood poisoning resulting from an accident to the deceased's hand on March 6, 1915, at the appellants' factory. No notice of the alleged accident was given to the appellants until after the man's death, but it appeared that the doctor who attended the man gave to his son a certificate under the National Insurance Act dated March 8 to the effect that the man was suffering from a poisoned wound on his finger. This certificate was signed by the doctor as a panel doctor, and was such as was required as a general rule by the appellants to be handed to them as a reason for absence from work in cases of illness. It was handed to the appellants by the deceased's son, but contained nothing about any accident having occurred to the man.

At the hearing of the arbitration it was contended that there was

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no evidence of the exact date of the accident, and that no notice of the accident had been given as required by s. 2 of the Act.

The county court judge said that the points taken were of a purely technical character, and he held that the deceased died on March 14, 1914, from blood poisoning ensuing from a wound in his hand received during his work at some date within forty-eight hours of March 6, and that this was an accident arising out of and in the course of his employment. Upon the point of notice he said that the Court of Appeal had long recognized that in the interests of business there must be some limit to the giving of notices of injury in respect of every cut or scratch which a man received in his every-day work. The deceased had reasonable cause not to report the cuts on his hands, because the accidents were apparently trivial and he was working on war material, the supply of which was a matter of great public urgency. Further, the employers had a doctor's certificate of his illness as soon as he was unfit for work and might have made any inquiries they thought fit; nor could the learned judge see that they had in any way been prejudiced by the want of notice. He accordingly awarded the applicants the sum of 300*l.* by way of compensation.

The employers appealed.

W. Shakespeare and *Harold Brandon*, for the appellants. In this case the applicant was not entitled to compensation for two reasons: (1.) no notice whatever was given of the accident; (2.) there was no evidence that any accident within the meaning of the statute had ever occurred. It is not enough that an accident has happened; it must be proved that there has been a definite accident, of which notice can be given, in the course of and arising out of the workman's employment. There is no evidence here that the slight wound in the man's finger, which appears to have caused the blood poisoning from which he died, happened in the course of or arose out of his employment; and no notice of any kind was given to the employers. The county court judge held that the absence of notice was immaterial because the accident was at first considered trivial, and afterwards the employers were not prejudiced. But there was no evidence that the wife thought the accident trivial or that the employers were not prejudiced by the absence of notice. The

burden of proving no prejudice is on the person claiming compensation, and she has not discharged it.

The county court judge has treated the question of notice of the accident as a mere technicality and of no importance.

[LORD COZENS-HARDY M.R. I cannot accept that view. The provisions of the Act as to notice are in my opinion most important.]

The same opinion was expressed in *Luckie* v. *Merry*. (1) The Act by s. 2 has specially provided for the form of the notice; it must be in writing: *Hughes* v. *Coed Talon Colliery Co.* (2)

[LORD COZENS-HARDY M.R. That is settled beyond all doubt; but the right to notice may be waived by conduct.]

Again, the county court judge has not considered the evidence as to prejudice. He has misdirected himself in arriving at a conclusion on the question of fact as to prejudice; his decision, therefore, cannot stand. It is clear that he could not properly have arrived at his finding upon the evidence, and the Court will set it aside.

It is not enough to show that the employers were not necessarily prejudiced by the want of notice. There must be evidence to support the finding of the arbitrator that the employers were not prejudiced. The question of the burden of proof in determining whether the employer is prejudiced by want of notice was considered by the House of Lords in *Hayward* v. *Westleigh Colliery* (3), but it is submitted that that case has not altered the law by shifting the onus from the workman on to the employer.

[BANKES L.J. The facts in that case were curiously like those in the present case. The only difference appears to be that there notice was given the day before the man died, and here it was not given until after the death.

LORD COZENS-HARDY M.R. We decided a similar case yesterday —*Jones* v. *Arnold*. (4)]

Hayward's Case (3) was considered in *Miller* v. *Richardson*. (5)

J. D. Cassels, for the respondent, was not called upon.

LORD COZENS-HARDY M.R. This case has been very fully and very ably argued, but, having given to it the best consideration that I can, I think that the appeal must fail.

(1) [1915] 3 K. B. 83, at p. 87.
(2) [1909] 1 K. B. 957.
(3) [1915] A. C. 540.
(4) Unreported.
(5) (1915) 8 B. W. C. C. 445.

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The material facts are short. An accident happened to the deceased man on or about March 5 or 6. The precise day upon which he got the scratch or the rub which ultimately led to blood poisoning is not ascertained; but evidence was given by the medical man, which justified the finding of the learned county court judge, to the effect that the injury had not occurred on the day when he saw the man, but that in his opinion it must have occurred two or three days before. An accident causing an injury of this kind, a slight abrasion, due to the nature of the work on which a man is engaged, and which does not develop for two or three days, is an accident of which you cannot really fix the precise date. I should be very sorry indeed if we were bound to hold that a dependant who makes a claim is to be deprived of relief if she has not done that which is a practical impossibility, namely, stated precisely the day or the hour on which the accident happened. I think that the difference between whether it happened two days or three days before the widow noticed the inflammation is not material and that the learned judge was quite right in allowing an amendment and in not tying the dependant down to the particular day which, in her application, she had alleged, that is, March 6. Therefore I think that that objection fails. I desire not to be thought for a moment to have expressed the view that particularity of time is not of the utmost importance, nor to be rigidly adhered to when the facts are such that particularity of that nature is possible. But here, where it is in evidence that workmen of this kind constantly get abrasions which may or may not lead to any serious consequence, and where it was practically impossible to say on which particular day this scratch or abrasion occurred, I think it would be extremely technical if we were to hold that the applicant failed on that ground.

The next point is this. The learned judge has held that, although no notice in writing—I think no notice at all—was given until the man died, on March 14, that is, seven or eight days after the accident, the employers were not prejudiced. That is a finding of fact of the learned county court judge; but unfortunately—with all respect to the learned county court judge—he has assigned in his judgment reasons to which it is in my opinion absolutely impossible that we should pay any attention, and which have placed his finding of fact in more or less peril. He obviously

treats the absence of notice as a mere technical, formal and unimportant point. He thinks that when once it is shown that the workman has in fact sustained injury by an accident in the employers' service arising out of and in the course of that employment all other considerations ought to be disregarded and compensation given to him. That is a view upon which, in my opinion, it is impossible for the Court to proceed. The very same Act which gave compensation to the workman prescribed, and most reasonably prescribed, that the employer shall have notice of the accident as soon as he reasonably can. That notice and the notice of claim both have to be given. That is for the protection of the employer, and obviously it is only in accordance with common sense that the employer should be entitled to that protection.

But then there comes the proviso which is for the protection of the workman or his dependant, namely, that if it can be reasonably proved that the employer has not been damaged then the notice may be dispensed with. The learned county court judge has found here that the employer was not prejudiced, and he has assigned reasons which seem to me to be plainly not admissible. He says: "To deprive the widow and the children of a man who has died serving his country by making munitions of war is unpatriotic, and it would be against public policy to allow it to be done." That is a doctrine which it is impossible for us to adopt. We are bound to administer the Act of Parliament as we find it and not to deprive the employers of the protection which the Act of Parliament plainly gives them. After the passage which I have just read he says this: "As Lord Halsbury pointed out, the Legislature wanted to give compensation to every injured man, and Lord Davey agreed that you ought to construe this Act so as, as far as possible, to give effect to the primary provisions of it. Once an arbitrator is convinced, on hearing the witnesses, of the truth of a set of facts he ought to give effect to his conclusions." That means that when once he is satisfied that the accident did arise out of and in the course of the employment he ought to give compensation, whether there is notice or not. I am very anxious to make it perfectly clear that I cannot for one moment assent to those observations of the learned county court judge, and I have felt considerable difficulty as to whether those observations did not amount to such a misdirection

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as to entitle the appeal to succeed. But, although there is a misdirection, it must be remembered that it is not every misdirection which requires a new trial. Order LIX., r. 6, says: "A new trial shall not be granted on the ground of misdirection unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned." Am I satisfied that some substantial wrong or miscarriage has resulted from this? On the whole I am not.

Now it is necessary to look rather carefully into the evidence and see whether there was not abundant material for the learned county court judge to come to the conclusion to which he did come.

The accident happened, as I say, on March 5 or 6, or possibly it may have been March 4. It was an accident of such a common nature, and so frequently not attended with any bad consequences, that nobody is to be blamed for not taking immediate action. At Messrs. Vickers's works provision is made for immediate attention being given to wounds which the workman himself or the foreman thinks likely to require such attention. That was not done. The doctor, however, saw the man at his home, the wife attended to the man's hand, and ultimately the death occurred on March 14, a week afterwards. It is not suggested in the evidence that any wrong advice was given or that the treatment of the man was otherwise than perfectly proper. It is not suggested that there is any doubt that if there was an accident it occurred in the works. It is not suggested, although the doctor was in Court attending the trial on behalf of the employers, that any question was put as to the treatment, or that there was any circumstance which led to the inference that the employers were in any way prejudiced.

This question of prejudice has been often considered by this Court and also by the House of Lords. In *Hayward's Case* (1), where the learned judge had found no prejudice, this Court set that aside on the ground that there was no evidence of that at all. The case went to the House of Lords, and the House of Lords took the view that, upon the facts of the particular case, there was evidence which justified the finding of the learned judge; but in the speeches of the noble Lords who took part in the decision somewhat conflicting

(1) [1915] A. C. 540.

views are taken as to whether you are to look at the whole of the evidence and consider whether there is any prejudice without regard to the onus of proof. That was the view of some members of the House of Lords. The other view was that there may be, in the first instance, some obligation on the part of the workman or the dependants to raise a case which requires answering. I think that all their Lordships agreed in this, that there may be some inherent probability of prejudice to the employer, and, if so, that must certainly be explained away. In a case which was before us yesterday—*Jones* v. *Arnold* (1)—we held that there was such an inherent probability of prejudice and we acted upon it. I see no reason, after listening to what has been said in the argument, to doubt that we were perfectly right in that conclusion, and that what we are proposing to decide now is not in any way inconsistent with what we did yesterday. I asked Mr. Shakespeare, who is very familiar with this Act and the authorities, "What suggestion even now do you make of prejudice?" It must be remembered that this is not a case like so many where the workman suffers that which is plainly an accident happening on a particular day at a particular hour and in a particular place, and as to which immediate attention may be required to that man, when the works doctor might with advantage be called to examine and see that proper care was taken, and that sort of thing. This is not a case of that kind. It is simply a case where the workman had an abrasion, which I am afraid is almost a common daily occurrence in work of this nature, and which very frequently leads to no permanent ill consequences, and which was properly dealt with in the few days which intervened between the accident and the death.

On the whole I think that the misdirection of the learned county court judge did not do substantial injustice, although I do not think that the reasons which he has assigned for his finding of no prejudice can be supported.

BANKES L.J. I agree. This appeal is founded upon the suggestion that the learned judge misdirected himself in that he entirely misconceived his position as arbitrator under the Act. I agree that Mr. Shakespeare has made that out. In fact it is self-

(1) Unreported.

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evident upon reading the judgment of the learned county court judge. It is fortunate for this applicant that she is not obliged to rest her case upon the reasons which the learned judge gave in his judgment for the conclusion at which he arrived. I desire to speak with full respect to the learned judge; but it does seem to me that, having regard to the views which he has himself expressed as to his position as arbitrator under the Act, it is time that those views should receive reconsideration in the interests of the very persons whom he is desirous of helping, because awards founded upon such reasons must necessarily lead to some extent and in some cases to the applicants being unable to support an award which has been given in their favour.

Finding that there is, or has been, misdirection, the only question, as it seems to me, for us in this case is whether or not that misdirection has occasioned any substantial wrong or miscarriage. Unless it has we ought not to interfere with the finding although we are satisfied that there was a serious misdirection. That depends upon the question as to whether or not there was evidence before the learned judge upon which any one ought to arrive at the conclusion that the employers were prejudiced by the want of notice. It seems to me that this question of prejudice must depend upon the facts of the particular case. There may be cases, such as the last case which we decided in this Court, *Jones* v. *Arnold* (1), in which it is obvious upon a consideration of the case of the applicant that there must have been prejudice; and there may be prejudice arising from the fact that the circumstances are such as in the interests of the employer called for immediate investigation on the spot. That, of course, would arise if there were a dispute as to whether there was or was not an accident. Again, there may be cases in which prejudice may arise owing to the employer being unable to make inquiries of his workmen before they become aware that the whole future of the dependants of the workman depends upon the answer which they give. Or there may be cases in which prejudice arises from the fact that a serious question may arise as to whether the deceased person received proper and sufficient medical attention and care. All those were points which arose in the last case; but in the present case, speaking for myself, it seems to me that the case

(1) Unreported.

presented to the learned county court judge by the applicant was one in which it ought to have been reasonably inferred that the employers had not been prejudiced. That being so, under the decision in *Hayward* v. *Westleigh Colliery Co.* (1) to which we have been referred the onus is thrown upon the employer of either showing by evidence or suggesting by argument that he was in fact prejudiced. We do not know exactly what form the argument took in the county court; but Mr. Shakespeare, with all his experience and ability, has been unable to suggest to us any real ground of prejudice. Under these circumstances I agree that in this case, although we cannot agree with the view of the learned county court judge and are satisfied that there was misdirection, we are equally satisfied that there was no substantial wrong or miscarriage, and I think therefore that the appeal ought not to succeed.

On the other part of the case I quite agree with what the Master of the Rolls has said.

WARRINGTON L.J. The only point upon which it is necessary, I think, to express any opinion is as to whether the finding of the learned county court judge that the employers were not prejudiced by the absence of notice was justified. Upon this question I think that the learned judge did not approach the matter from the right point of view. He seems to have regarded the objection as to absence of notice as a merely technical objection, and not only that, but as an objection which it was wrong in a moral sense to raise, and one therefore to which he ought not, unless he was driven thereto, to give effect. In that view he was, in my opinion, acting contrary to the express provisions of the statute and to many expressions of opinion in this Court; and he has succeeded in exposing the applicant to very serious risk of losing the award in her favour. But, making all allowance for that, one has then to consider whether any serious miscarriage of justice has resulted from the finding at which he has arrived. He has in fact found that there was no prejudice to the employer from the absence of notice, and we still, I think, with all respect to Mr. Shakespeare's argument, have to find whether, looking at the facts and all the facts as proved, there was evidence

(1) [1915] A. C. 540.

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upon which a reasonable man, not approaching the question with the prejudice with which, I think, the learned county court judge in this case approached it, could come to the conclusion at which the learned judge arrived. Upon that point I do not propose to repeat what has been said by my brethren, but only to say that I arrive at the same conclusion. I think that there was in this case evidence upon which the finding that the employer was not prejudiced could have been arrived at.

For this reason I agree that the appeal ought to be dismissed.

I agree with the judgment of the Master of the Rolls on the other point.

Appeal dismissed.

Solicitors: *W. Carpenter & Sons; R. H. Bentley.*

G. A. S.

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Police—Special Constable—Power of Commissioner of Metropolitan Police to dismiss—Special Constables Act, 1831 (1 & 2 *Will* 4, *c.* 41), *ss.* 4, 9, 10—*Police Act*, 1839 (2 & 3 *Vict. c.* 93), *s.* 6—*Special Constables Act*, 1914 (4 & 5 *Geo.* 5, *c.* 61), *s.* 1, *sub-s.* 1—*Special Constables Order*, 1914, *Regulations* 5, 6, *and Schedule.*

By s. 1, sub-s. 1, of the Special Constables Act, 1914, "His Majesty may, by Order in Council, make regulations with respect to the appointment and position of special constables appointed during the present war under the Special Constables Act, 1831, ... and may, by those regulations, provide (inter alia) . . . . (*c*) for the application to special constables to which the regulations apply of any of the provisions of the Police Acts, 1839 to 1910, ... subject to such modifications as may be specified in the regulations . . . ." By s. 6 of the Police Act, 1839, the chief constable may at his pleasure dismiss all or any of the other constables to be appointed for the county.

Regulations known as "The Special Constables Order, 1914," were made under the Act. By regulation 6 the chief officer of police may at his pleasure dismiss any special constable:—

Held, that the regulation was not ultra vires, inasmuch as upon the true construction of the word "position" in s. 1, sub-s. 1, of the Act of 1914—viewed in the light of the power of dismissal by the chief constable contained in s. 6 of the Police Act, 1839, which is

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applied with the necessary modifications by clause (*c*)—it was the intention of the Legislature to confer the power to make regulations not only with respect to the position of special constables while they hold that office, but also with respect to the determination of the office.

Held, therefore, that the Commissioner of Metropolitan Police (who is by the schedule to the Order the "chief officer of police" for the Metropolitan Police District) has the power to dismiss a metropolitan special constable.

Per Lush J.: Even without the aid of clause (*c*) the words in s. 1, sub-s. 1, of the Act of 1914 conferring power to make regulations with regard to the "appointment and position" of special constables would in their natural meaning include a power to make regulations with respect to the termination of the office of a special constable.

CASE stated by a metropolitan magistrate.

An information was laid before the magistrate on August 15, 1915, by the appellant, the Commissioner of Metropolitan Police, against the respondent, Arthur H. Hancock, whereby the respondent was charged for that he having been appointed a member of the Metropolitan Special Constabulary attached to the Bethnal Green Police Station, and having been removed from such office by order of the appellant dated April 15, 1915, did omit to hand over forthwith to Sub-divisional Inspector Millard, of the Bethnal Green Police Station, a truncheon, an armlet, and a warrant card, being articles provided for his use as such special constable, in accordance with the written direction to that effect made by a justice of the peace for the county of London acting for the Tower Hamlets Division dated and served upon the respondent on July 5, 1915, contrary to s. 10 of the Special Constables Act, 1831.

The following facts were either proved or admitted on the hearing before the magistrate:—

On August 17, 1914, the respondent was duly sworn in at Bethnal Green Town Hall as a special constable for the Metropolitan Police District, in pursuance of the Special Constables Act, 1831.

On April 5, 1915, the respondent was dismissed from his office of a special constable by the appellant.

On July 5, 1915, a justice of the peace for the county of London, acting for the Tower Hamlets Division, in which the respondent acted as a special constable, directed the respondent in writing to hand over forthwith to Sub-divisional Inspector

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Millard, of the Bethnal Green Police Station, the following equipment then in his possession, to wit, a warrant card, a whistle, a truncheon, an armlet, and a pocket-book. The respondent failed to comply with the written direction.

By s. 4 of the Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), "the justices of the peace who shall have appointed any special constables under this Act, or any two of them, or the justices acting for the division or limits within which such special constables shall have been called out, at a special session of such last-mentioned justices . . . . shall . . . . have power to remove any such special constable from his office for any misconduct or neglect of duty therein."

By s. 9, "The justices who shall have appointed any special constables under this Act are hereby empowered, or the justices acting for the division or limits within which such special constables shall have been called out, at a special session to be held for that purpose . . . . are hereby empowered to suspend or determine the services of any or all of the special constables so called out, as to the said justices . . . . shall seem meet . . . ."

By s. 10, "Every such special constable shall, within one week after the expiration of his office, or after he shall cease to hold and exercise the same pursuant to this Act, deliver over to his successor (if any such shall have been appointed) or otherwise to such person and at such time and place as may be directed by any justice of the peace acting for the division or limits within which such special constable may have been called out, every staff, weapon, and other article which shall have been provided for such special constable under this Act; and if any such special constable shall omit or refuse so to do, he shall, on conviction thereof before two justices of the peace, forfeit and pay for such offence such sum of money not exceeding two pounds as to the convicting justices shall seem meet."

By s. 6 of the Police Act, 1839 (2 & 3 Vict. c. 93), the chief constable may at his pleasure dismiss all or any of the other constables to be appointed for the county.

By s. 1, sub-s. 1, of the Special Constables Act, 1914 (4 & 5 Geo. 5, c. 61), "His Majesty may, by Order in Council, make regulations with respect to the appointment and position of special constables

appointed during the present war under the Special Constables Act, 1831, ... and may, by those regulations, provide—

"(*a*) that the power to authorise the nomination and appointment of special constables under the Special Constables Act, 1831, may be exercised although a tumult, riot, or felony has not taken place or is not immediately apprehended; and

"(*b*) that any special constables to which the regulations apply shall, in the execution of their duty, act under such direction as may be specified in the regulations; and

"(*c*) for the application to special constables to which the regulations apply of any of the provisions of the Police Acts, 1839 to 1910 (including those relating to the grant of allowances or gratuities to constables injured, and to the dependants of constables killed, in the execution of their duty), subject to such modifications as may be specified in the regulations; and

"(*d*) for giving validity and effect to the appointment of special constables, or any other action taken with respect to special constables since the commencement of the present war, but before the regulations are made; and

"(*e*) for such supplemental and ancillary matters as may be necessary or expedient for the purpose of giving full effect to the regulations."

By an Order in Council made on September 9, 1914, regulations which may be cited as "The Special Constables Order, 1914," were made under the Act. By regulation 5, "All special constables shall in the execution of their duty act under the direction and control of the chief officer of police of the police area for which they are appointed . . . ."

The Metropolitan Police District is by the schedule to the Order the "police area" within the meaning of the Order, and the appellant is the chief officer of police within such area.

By regulation 6, "A special constable may, with the consent of the chief officer of police or other authority under whose direction and control he acts, resign his office, and the chief officer of police or such other authority may at his pleasure determine the service of, or suspend or dismiss, any special constable."

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It was contended for the respondent that regulation 6, above set out, was ultra vires, and that the appellant had no power to dismiss the respondent thereunder, but that justices of the peace under and in manner provided by ss. 4 and 9 of the Special Constables Act, 1831, had alone such power.

It was contended on behalf of the appellant (1.) that regulation 6 was valid and was not ultra vires by reason of s. 1, sub-s. 1, clause (*c*), of the Special Constables Act, 1914, and (2.) that the respondent was lawfully dismissed by the appellant.

The magistrate came to the conclusion that the respondent had not been dismissed in manner provided by ss. 4 and 9 of the Special Constables Act, 1831, and that regulation 6 was ultra vires, and that the respondent had not been lawfully dismissed. He therefore dismissed the information.

The question for the opinion of the Court was whether the magistrate was right in law in dismissing the information.

A. H. Bodkin and *H. D. Roome*, for the appellant. The magistrate was wrong in holding that regulation 6 of the Special Constables Order, 1914, was ultra vires. The respondent was appointed under the Special Constables Act, 1831. Sect. 4 of that Act deals with what may be called disciplinary dismissals, s. 9 more with the general disbandment of special constables. The special constables were appointed on what may be called the parochial system, and the justices were only allowed to appoint them for the protection of the inhabitants and the security of property in any "parish, township, or place" in the event of tumult, riot, or felony taking place or being immediately apprehended. Under the Special Constables Order, 1914, justices are to take an oath from the persons appointed in the same form as under s. 1 of the Act of 1831 except that the words "parish [or township]" are omitted. Under the Act of 1831 the special constables were appointed for a limited area and remained under the control of the justices until disbanded. Under s. 1 of the Special Constables Act, 1914, a general power is conferred upon the Crown to deal with the "appointment and position" of special constables appointed during the present war under the Special Constables Act, 1831. Clauses (*a*), (*b*), (*c*), (*d*), and (*e*) of sub-s. 1 of s. 1 are merely illustrations of the important

matters which may be expected to be dealt with. There would be no violence done to the language if the words "appointment and position" were construed as including the determination of the appointment. A regulation dealing with the determination of the position of special constables is a regulation "with respect to" that position. The word "position" is placed in antithesis to "appointment." It is wide enough to include the determination of the position. The word "ancillary" in clause (*e*) of sub-s. 1 of s. 1 means "auxiliary" or "serving as an adjunct," and includes such an obvious matter for giving effect to the regulations as the manner in which special constables may be disbanded as a body or dismissed as individuals. But clause (*c*) of the sub-section clears up any doubt as to the meaning of the words "appointment and position." Great care in framing the regulations has been taken to apply the actual provisions of the code of statutes which consists of the Police Acts, 1839 to 1910, with certain modifications. Clause (*c*) does not merely provide for the application to special constables of statutes or sections as a whole, but for the application of any provisions contained in the statutes. Regulation 1 is in substance a reproduction of s. 1, sub-s. 1, of the Special Constables Act, 1914. Regulation 2 is nearly a reproduction of s. 1 of the Special Constables Act, 1831, but for the words "parish, township, or place" is substituted "police area," the reason being that under regulation 10 "police area" is defined and includes, by reference to the schedule to the regulations, the Metropolitan Police District. Regulation 3 gives the form of a declaration to be made by a special constable, with a similar modification being made in the omission of the words "parish [or township]" which are contained in the form of oath in the Act of 1831. Regulation 4 is a repetition of s. 5 of the Special Constables Act, 1831, combined with s. 6 with the words "police area" substituted for "parish, township, or place." Regulation 5 shows how the regulations deal with clause (*b*) of s. 1, sub-s. 1, of the Special Constables Act, 1914. Regulation 6, upon which the present case turns, corresponds, subject to modifications, with ss. 4 and 9 of the Special Constables Act, 1831. Under ss. 4 and 6 of the Police Act, 1839, the chief constable was appointed by the general body of justices in quarter sessions, and he appointed the constables subject to the approval of the justices

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in petty sessions, and the chief constable had power to dismiss all or any of them. Under s. 6 of the Act of 1839 the approval of the justices was not necessary to the dismissal of a constable by the chief constable. By s. 13 no constable was to resign except on giving one month's notice, while under the Special Constables Act, 1831, a special constable had no power to resign at all. Therefore, unless under clause (*c*) of s. 1, sub-s. 1, of the Act of 1914 the provisions of the Police Act, 1839, could be made applicable, no special constable would be able to resign. The draftsman of the regulations therefore extracted the necessary portions of ss. 6 and 13 of the Act of 1839 and applied them with the necessary modifications to special constables, and regulation 6 is the actual application of that portion of the code of statutes which deals with dismissal. Regulation 7 is an illustration of the same method. In s. 15 of the Act of 1839 there is a provision for the infliction of a penalty for assuming the dress of a constable, but there is no such provision in the Act of 1831. Therefore, unless there were power to apply the provisions of the code upon that point, there would be no power to adopt that useful provision, and regulation 7, which does so would be ultra vires. By regulation 9 ss. 2 and 5 of the Police Act, 1890, have been applied and modified. Regulation 10 gives authority to the schedule contained in the regulations. By regulation 11 s. 10 of the Special Constables Act, 1831, is kept alive. The result is that power to appoint special constables was given by the Act of 1831, but power to regulate them after appointment was conferred by the Act of 1914.

Whatever is done between August 4 and 28 is done under the Act of 1831, and what is done afterwards under the Act of 1914 relates back to the Act of 1831. Special constables are only dealt with by the Special Constables Acts, 1831, 1835, and 1838, and there are no other statutes applicable to them. If it were not for clause (*c*) of s. 1, sub-s. 1, of the Act of 1914 there would be no power to grant pensions to special constables, nor could they resign, nor could a penalty be inflicted upon the persons masquerading as special constables. The word "modifications" in clause (*c*) means alterations within the spirit and object of the Act of 1914, and the alterations made by the regulations are clearly within the object and spirit of the Act.

McCall, K.C., and *E. Abinger*, for the respondent. The ordinary canon of construction applies to the present case, namely, that no general words in a statute will take away a right conferred by an earlier statute unless the earlier statute is referred to, or it is clear that it was intended by the later statute to take away the right. Words must be found in the later statute wholly inconsistent with the prior statutory right. By the Special Constables Act, 1914, the sole power conferred is to make regulations with respect to the "appointment and position" of special constables. Those words were carefully chosen and are limited to regulations with respect to the entry of the special constable into his position and his status while he is in that position. It could not have been the intention of the Legislature to invest a person not mentioned in the Special Constables Act, 1831, with the power to dismiss special constables. The word "position" means the status in the force of a special constable after his appointment. It would be a violent strain on the meaning of the word "position" to construe it in a sense which takes away privileges conferred by the Special Constables Act, 1831. Clauses (*a*) to (*e*) in s. 1, sub-s. 1, of the Act of 1914 show the restrictions within which regulations made under the Act must be confined. Therefore any regulations not within those clauses are ultra vires.

In *Reg.* v. *Bird* (1), where a rule which had been made by a Court of quarter sessions was held to be ultra vires as imposing a condition not authorized by the statute under which it purported to be made, Wills J. said: "But the question is whether it is within the power to make rules conferred on the county justices by the statute. . . . . I think the sounder view is that the right of the justices to make rules, however wide may be the area that they cover, cannot affect the privilege of the objector to be heard in opposition to the confirmation, and that these particular rules really do impose fresh conditions upon the exercise of the objector's right. . . . . I desire in my judgment to adopt a broad principle which is too clear to need cases to be cited for its justification—the principle that where a power to make regulations is given to a public body by statute, no regulations made under it can abridge a right conferred by the statute itself." The proposition would be equally true if the word

(1) [1898] 2 Q. B. 340, at pp. 344, 345

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"itself" were omitted and the words "unless the later statute expressly empowers the subordinate legislative body to take away the right" were added. If the Special Constables Act, 1914, was intended to take away the right of the special constable to be heard before the justices express words would have been used giving the power of dismissal to the chief constable. The words "appointment and position" were deliberately used and the word "dismissal" omitted. The meaning of clause (*c*) is that regulations can only be made applying such provisions of the Police Acts, 1839 to 1910, as are consistent with the words "appointment" and "position" used in their natural meaning.

A. H. Bodkin in reply. Clause (*c*) allows any of the provisions in the code contained in the Police Acts, 1839 to 1910, to be applied to special constables, including the power of dismissal. That throws light upon the meaning of the word "position." The words "and may, by those regulations, provide" are not the words which the Legislature would have used if it intended to limit the power to make regulations to the subject-matter of clauses (*a*) to (*e*). [*Municipal Corporation of City of Toronto* v. *Virgo* (1) was also referred to.]

LORD READING C.J. . The question which arises in this case is whether the Commissioner of Metropolitan Police has the power under regulations made in pursuance of the Special Constables Act, 1914, to dismiss the respondent, who had been properly appointed and who was serving as a special constable.

The determination of this question depends upon the interpretation of the words used in the Act of 1914. Regulation 6 of the Special Constables Order, 1914, forms part of an Order in Council made at a Court on September 9, 1914, purporting to be in pursuance of the powers created by the Special Constables Act, 1914. If that regulation is within the powers conferred by the statute to make regulations by Order in Council, then the Commissioner has the right to dismiss the special constable. If, on the other hand, the regulation, which provides for the dismissal of special constables, is not authorized by the Act of 1914, then there was no statutory power conferred by the Act to make it, and as it purports to be made,

(1) 1896] A. C. 88.

and can only be justified as having been made, in pursuance of the statutory powers conferred by the Legislature, it would be invalid and of no effect.

The question turns, therefore, upon the meaning to be given to the words of the Act of 1914 which confer the power of making regulations. Before referring to those words it is as well to bear in mind that there was in existence before the passing of the Act of 1914 a statutory power to enrol persons as special constables. That power was given by the Special Constables Act, 1831. There were also the two other statutes, namely, the Special Constables Act, 1835 (5 & 6 Will. 4, c. 43), and the Special Constables Act, 1838 (1 & 2 Vict. c. 80), dealing with the same subject-matter. There were also in existence statutes known as the Police Acts, 1839 to 1910, which regulated the practice with regard to the police and provided for dismissal, appointment, and determination of appointments in various ways, but which did not apply to special constables. Therefore before the Act of 1914 there were the three earlier statutes applying to special constables and a series of Acts of Parliament known as Police Acts which did not apply to special constables. When the present war broke out a number of special constables were sworn in. The respondent was sworn in on August 17, 1914, before the Special Constables Act, 1914, had been passed. It is immaterial to consider what the particular position of special constables then sworn in was, because by the Act of 1914, passed on August 28, eleven days after the appointment of the respondent, regulations were provided for giving validity and effect to appointments since the commencement of the war. We may therefore deal with the present case as if the appointment of the respondent had been made after the Act of 1914 had become law.

In my judgment the question in this case depends upon the meaning to be attributed to the words "position of special constables" in s. 1, sub-s. 1, of the Special Constables Act, 1914, which enacts that "His Majesty may, by Order in Council, make regulations with respect to the appointment and position of special constables appointed during the present war under the Special Constables Act, 1831, ..." That language assumes that there is already in existence a power of appointment of persons as special constables, and in my judgment the Legislature intended by the

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Lord Reading C.J.

Act of 1914 to confer upon His Majesty in Council power to make regulations with respect to the appointment and position of those special constables. On behalf of the appellant it was contended that in the word " position " must be included not only the position of the special constable during the tenure of his office of special constable, but also the right of some particular officer to determine the appointment. For the respondent it was contended that the word " position " can only mean in this respect " status," and cannot mean status in the sense of empowering regulations to be made determining the status, and that, although any regulation which comes within the powers conferred affecting the status of the special constable may be made, a regulation which would put an end to his position cannot be made. The question is which of those two contentions is right. I do not take exception in any way to the principles of construction of statutes which were put before us by Mr. McCall on the respondent's behalf. In my opinion they were quite correctly stated by him. We have to apply them to the present case. In my judgment when the Court has to construe a word contained in a statute it is entitled not only to look at the actual word as it is found, but also at other language in the statute for the purpose of construing the meaning of that word, and I come to the conclusion that when the Legislature enacted by the Special Constables Act, 1914, that regulations may be made in respect of the position of special constables it intended to include the power to make regulations which would enable their position to be determined. Whatever doubt I might have had in arriving at that extended meaning of the word " position," if I had only the first words of sub-s. 1, is removed when I refer to clause (*c*) of the sub-section, because there I find that power is given to make regulations applying to special constables any of the provisions of the Police Acts, 1839 to 1910, and those statutes do not apply to special constables unless some further legislation is made. The object of introducing clause (*c*) is to enable those provisions, including the provision relating to the grant of allowances or gratuities to special constables and to their dependants when killed, to be applied to special constables appointed under the power given by the Act of 1914. In my opinion the argument for the appellant upon this

point is unanswerable. By reference to the various regulations it is seen that they adopt part of the Act of 1839 and subsequent statutes known as the Police Acts, with certain modifications introduced by reason of the particular course of events and the circumstances existing during the war. The actual power given is to apply those provisions subject to such modification as may be specified in the regulations. Under the Police Act, 1839, there is power granted to the chief constable to dismiss constables without the justices' consent. Therefore there is a power of dismissal which is given under one of the statutes which may be applied by the regulations to the position of special constables. Under the Police Act, 1839, the chief constable may dismiss without the justices' consent, while under the Special Constables Act, 1831, it could only be done by the order of two justices.

Now, as there is the power of dismissal by the chief constable under the Act of 1839, and any of the provisions of the Act of 1839 may be incorporated with modifications, I fail to understand why the modification which enables a chief officer of police to dismiss is not such a modification of an Act of Parliament as is expressly included under clause (*c*), and why that modification would not be within the powers conferred by the Act of 1914. In my judgment, therefore, the magistrate was wrong in his conclusion. He has given too narrow an interpretation of the words which have been the subject of so much discussion; and if he had looked at the whole statute for the purpose of construing them he would have come to the conclusion that there was the right to introduce the power taken under the regulation, and consequently that the regulation is good. The result is that under that regulation the Commissioner of Metropolitan Police had the power to dismiss the respondent, and as a necessary consequence he was bound to give up the equipment.

AVORY J. I am of the same opinion. As the magistrate has given a very careful judgment, which appeared according to my first impression to be well founded, I think it right to add a few words in order to explain the reason why I have come to the conclusion that the judgment delivered by the Lord Chief Justice is right. The magistrate held that the Special Constables Act, 1914,

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only gives power to make regulations provided for by clauses (*a*) to (*e*) of s. 1, sub-s. 1; that that power to make regulations is limited to the specific matters which are there mentioned, and that there is no power to make any regulation generally with respect to the appointment and position of special constables. It is not necessary in the present case to decide whether that view of the magistrate was right or wrong, and I must not be taken to assent to the proposition that the power to make regulations is limited specifically to the matters mentioned in clauses (*a*) to (*e*). I think it may well be that there is under the Act of 1914 a general power to make any regulation with respect to the appointment and position of special constables. But the question remains whether regulation 6 of the Special Constables Order, 1914, is a regulation with respect to the position of a special constable.

Now at first sight I think there is great force in the argument which was presented to us on behalf of the respondent that if the Legislature intended the word "position" to include dismissal they would have said so, and it is true that if they had said so this Court would not have had the pleasure of listening to the arguments which have been presented to us. It is obvious that in the ordinary course, if it was proposed to deal with the power of dismissal of a person, the ordinary and natural language which would be employed would be to say that a regulation could be made with respect to his appointment and dismissal. The statute, however, has said that regulations may be made with respect to the appointment and position of special constables appointed under the Act of 1831. It is equally obvious, on the other hand, that a regulation which deals with a power of dismissal may be one which in fact deals with his position. The regulation might in terms say that the special constable shall hold his position as a special constable until he is dismissed by the chief officer of police. If it were drawn in those words I cannot doubt that that would be a regulation as to his position, because it would regulate the time during which he shall hold the position. The word "position" is therefore capable of including a power of dismissal. Now in order to determine whether it does in this particular case include that power I think one must have regard to the other provisions of the Act of 1914, and looking at paragraph (*c*) I find it is there specifically

enacted that the regulations may provide for the application to special constables of any of the provisions of the Police Acts, 1839 to 1910, including those relating to the grant of allowances, &c. I understand that to mean that the regulations may provide for the application to special constables of any of the provisions which are to be found in those statutes. I turn to the Police Act, 1839, and find s. 6 of that statute expressly gives a power to the chief constable of the county to dismiss at his pleasure any constable without reference to the justices. In my judgment that throws a light on the meaning of the word "position" in the Act of 1914. It appears to contemplate that the provisions of s. 6 of the Act of 1839 giving the power of dismissal at pleasure to the chief constable may by the regulations be made to apply to special constables subject to any modification that may be specified. The only modification of that provision specified in regulation 6 is that the power of dismissal is given to the chief officer of police in substitution for the chief constable of the county. That being so, I have come to the conclusion, looking at the whole statute, that the word "position" in the Special Constables Act, 1914, includes the power to dismiss, and that therefore the magistrate was wrong.

I should not have added anything to what my Lord has said, thoroughly agreeing with it as I do, had it not been that the matter is undoubtedly of importance, as the effect of the regulation is to take away the right of the special constable to appear at the special session of the justices, where no doubt he would be entitled to be heard in opposition to the proposal to remove him. Under the Special Constables Act, 1831, the justices could only remove him at a special session, and the constable had a right to appear at the session and show cause why he should not be removed. I agree that the judgment of the magistrate should be reversed.

LUSH J. I agree. Even without the aid of clause (*c*) of s. 1, sub-s. 1, of the Special Constables Act, 1914, I should have been of opinion that regulation 6, by which the chief officer of police is empowered at his pleasure to determine the service of or suspend or dismiss any special constable, is authorized by the statute and is not ultra vires. I quite agree with the contention on behalf of

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the respondent that the words in s. 1, sub-s. 1, " with respect to the appointment and position of special constables " are in themselves capable of the more restricted meaning which was sought to be placed upon them. The words may indicate a power to make regulations with respect to their appointment and with respect to their position while they are special constables, but on the other hand the words are at least equally capable of the more extended meaning, and in my view that is the ordinary meaning which they would naturally bear. I adopt the expression " status " as being equivalent to " position." I think that is what the word " position " means, and in my view the power to make regulations with respect to the appointment of the officer—that is, the creation of his office—and with respect to his status would naturally include a power to make regulations with respect to the termination of his office. It seems to me that it is impossible, if one wishes to know what the status of an officer is, to know all that relates to it unless one knows among other things to what authority he is subject and what authority it is that can put an end to his services. Those matters all form part of his status, and I think, without invoking the assistance of clause (*c*), that the more extended meaning is the natural one to put upon those words. But when one turns to clause (*c*) that view is very strongly fortified. Clause (*c*) expressly enables the authority who makes the regulations to apply any of the provisions in the group of Police Acts it mentions subject to such modifications as may be specified. One or some of the provisions in the group of Police Acts are, as one would have expected, provisions relating to dismissal of a police officer, and when one finds in clause (*c*) a power to apply any one of them, including therefore those relating to dismissal, it seems to me to make it perfectly clear that the status or position of a special constable contemplated by s. 1, sub-s. 1, includes the question when, how, and by whom he can be dismissed.

The magistrate bases his judgment, which I quite agree was a very careful one, upon the following reasoning. He says that the group of clauses (*a*) to (*e*) in s. 1, sub-s. 1, of the Special Constables Act, 1914, not only illustrates the subject-matter of the regulations, but literally restricts them, and that no regulation which travels outside the specific instances given in clauses (*a*) to (*e*) can be intra vires.

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With great respect I disagree. I see no reason whatever for holding that these clauses are more than illustrations. On the contrary I think, if one turns to clause (*c*), the principle upon which the statute has been drafted immediately becomes clear. In clause (*c*) the words "including" the provisions "relating to the grant of allowances" need not have been included, as there is power to apply any of the provisions in the group of Police Acts. The clause would, without those words, necessarily have included the provisions as to the grant of allowances, and those words are in themselves redundant—they are given as specific examples of the department over which the regulations were intended to operate. In my view exactly the same observation applies to the whole subject-matter embraced in clauses (*a*) to (*e*).

But even if the magistrate was right in the view which he took as to the restrictive operation of the clauses, I still differ from him in the conclusion at which he has arrived. His attention was not called to the important sections in the group of Police Acts. If it had been, I think he would have seen that, even if the clauses were intended to restrict the wide language in the earlier part of the section, they include the powers in the group of statutes as to dismissal, and that, following his own reasoning, the power as to dismissal of the special constable is one intended to be dealt with by regulations. I agree, therefore, that his judgment is wrong.

LORD READING C.J. It is right to add that the attention of the magistrate seems to have been directed exclusively to clause (*e*), which deals with supplemental and ancillary matters, and that the argument before him was not that placed before us to-day. The argument before him proceeded on clause (*e*) and not on those clauses to which our attention has been called. I make that observation in order to indicate that he had not the same advantage in the argument before him as we have had to-day.

Case remitted.

Solicitors for appellant: *Wontner & Sons.*
Solicitors for respondent: *Philbrick & Co.*

J. E. A.

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Nov. 18, 19, 26.

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Nuisance—Highway—Sheep straying on Highway—Damage to Vehicle using Highway.

While the plaintiffs' motor car was being driven along a highway in the daylight at a rate of sixteen to twenty miles an hour, the driver saw in front of him on the road a number of sheep unattended; he put on his brakes, and almost immediately thereafter two sheep, which had apparently been left behind by the others, jumped from the bank on the near side, and one of them ran in front of the car and broke part of the steering gear, in consequence of which the driver lost control, and the car ran into the bank and was damaged. The sheep were the property of the defendant, who was subsequently prosecuted and fined under s. 25 of the Highway Act, 1864, for having allowed them to stray on the highway. In an action against the defendant by the plaintiffs in respect of the damage to the car, the county court judge found that the sheep escaped on to the highway from the defendant's field owing to a defective hedge; that it is the natural tendency of sheep which are untended to run across or otherwise endanger vehicles in a road; that it is a matter of common knowledge that when sheep find themselves separated from the bulk of the flock they have almost a mania for rejoining it, and are perfectly regardless of intervening traffic; that the defendant had been guilty of negligence, or had committed a nuisance, in allowing the sheep to stray on to the highway; and that the accident was the natural consequence thereof. He accordingly held that the defendant was liable. On appeal:—

Held, allowing the appeal, that even assuming that there was evidence of negligence or of a nuisance committed by the defendant in allowing the sheep to stray on to the highway, yet, there being no evidence of "a vicious or mischievous propensity" on the part of the sheep within the meaning of the decided cases, the accident was not the direct and natural consequence of such negligence or nuisance.

Cox v. *Burbidge* (1863) 13 C. B. (N.S.) 430 applied.

Semble (*per* Lush J.): If sheep were allowed to stray through defective fencing and be on the road at night, and the driver of a cart or motor car, driving with due regard to all such possible risks were to run against them in the dark, the negligent owner of the sheep might be liable.

Appeal from Warwick County Court.

The plaintiffs sued the defendant for damage to their motor car caused, as they alleged, by the negligence of the defendant in the following circumstances. While the car was being driven, in the

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vicinity of Kenilworth, along a highway in the daylight at a rate of sixteen to twenty miles an hour, the driver saw in front of him on the road about twenty sheep, unattended; he put on his brakes, and almost immediately thereafter two sheep, which had apparently been left behind by the others, jumped from the bank on the near side, and one of them ran in front of the car and came into violent collision with, and broke part of, the steering apparatus. The driver lost control of the car, which ran on to the bank and was overturned and seriously damaged, none of the occupants, however, being injured. The sheep which were on the highway, including the sheep which ran into the car, were the property of the defendant, and he was subsequently prosecuted and fined under s. 25 of the Highway Act, 1864, for having allowed the sheep to stray on the highway.

The county court judge found that the sheep escaped on to the highway from a field adjoining thereto occupied by the defendant, and in which the rest of the flock still was at the time of the accident; that the hedge which divided the field from the highway had several large gaps in it and was inadequate to prevent sheep from passing through on to the highway; that the fair inference to be drawn from the facts was that the sheep were placed in the field above mentioned by the defendant or his servants; and the county court judge decided the case upon that footing. The county court judge further found, if it was a question of fact, that it is the natural tendency of sheep which are untended to run across or otherwise endanger vehicles in a road; that it is a matter of common knowledge that when sheep find themselves separated from the bulk of the flock they have almost a mania for rejoining it, and are perfectly regardless of intervening traffic. If the question was one of law he said he should come to the same conclusion. He further held that owners and occupiers of land adjoining an ordinary highway, that is, one not passing through commons or waste land, are under a duty to keep their animals from being or lying thereon, otherwise than in the exercise of the right of passage, so as to make it less safe or commodious for the public; that the defendant had committed a breach of this duty by placing the sheep in a field with an inadequate fence between it and the highway; that it was the natural consequence of this that the sheep escaped on to the highway and caused danger to the traffic thereon; and that as

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a natural consequence of such escape the accident was caused to the plaintiffs' car, and particular damage caused to them thereby. He accordingly gave judgment for the plaintiffs for 100*l.*

The defendant appealed.

Joy, for the defendant. The defendant was not guilty of any negligence, for although there was evidence of gaps in the hedge which separated the defendant's field from the highway, there was no evidence that the defendant knew of their existence. But, even assuming that the defendant knew of the existence of the gaps, he would nevertheless not be liable to the plaintiffs, inasmuch as it is not the natural act of a trespassing sheep to run into or upset a motor car. *Cox* v. *Burbidge* (1) decided that the owner of an animal mansuetae naturae, although liable for damage done by it in accordance with its ordinary nature, as for example where a cow strays and eats the herbage of another, is not liable if the animal does something which is quite contrary to its ordinary nature—something which the owner has no reason to expect it will do. If the owner is liable for any act done by the trespassing animal the defendant in *Cox* v. *Burbidge* (1) should have been held liable, but it was held that he was not liable. In order to make the present defendant liable the plaintiffs must establish that the act complained of was due to the mischievous propensity of the animal, and not merely, as was the case here, that the act was due to the animal's lack of sense. In such cases scienter on the part of the owner is the important factor—*Cox* v. *Burbidge* (1)—and the fact that the animal was trespassing is not the material question to be considered. That this is so is clear also from the decision in *Bradley* v. *Wallaces.* (2) There a workman was killed by the kick of a horse belonging, not to his employers, but to third parties, by whose servant it was brought upon the employers' premises and left unattended. The workman's dependants obtained compensation under the Workmen's Compensation Act, 1906, from the employers, who thereupon claimed an indemnity from the owners of the horse. The county court judge held that the question of scienter on the part of the owners of the horse was immaterial, that the bringing of the horse upon the employers' premises was a trespass, and that

(1) 13 C. B. (N.S.) 430. (2) [1913] 3 K. B. 629.

by reason of negligently leaving it there unattended the accident happened, and they were liable to indemnify the employers. The Court of Appeal reversed that decision, holding that it was not in the ordinary course of things that a horse not known to be vicious should kick a man, and that even assuming trespass the damage did not naturally flow from it.

The liability of the owners of animals which have caused damage while trespassing has been considered in several recent cases. In *Hadwell* v. *Righton* (1) the facts were that a fowl which was on a highway, being frightened by a dog, flew into the spokes of the plaintiff's bicycle, causing it to upset, whereby the plaintiff was injured. It was held that the owner of the fowl was not liable, as the damage was not the natural consequence of the fowl's presence on the highway. In *Higgins* v. *Searle* (2) the owner of a sow which had strayed on to a highway was held not liable for damage occasioned by the sow causing a horse to shy as the plaintiff's motor car was passing, whereby the car, in endeavouring to avoid the horse, was seriously damaged. There the jury expressly negatived negligence on the part of the owner of the sow in allowing it to be on the highway, but there the sow was trespassing just as the sheep was in this case. In *Jones* v. *Lee* (3) the facts were that a young horse escaped from a field adjoining a highway owing to a defective hedge and strayed upon the highway. While the plaintiffs, who were cycling, approached, the horse suddenly turned round, ran across the road, and, coming in contact with the bicycle, fell, and then, jumping up, lashed out and injured one of the plaintiffs and damaged the bicycle. The owner of the horse was held not liable to the plaintiffs, as the injury was not the natural consequence of his negligence, if any. In that case Bankes J. held that at common law there is no duty on the owner or occupier of land adjoining a highway to keep his animals off the highway. In *Ellis* v. *Banyard* (4) it was decided that the defendant, the owner of cattle which had been placed in a field adjoining a highway and from which some of them escaped into the highway through an open gate and injured the plaintiff, who was on the highway, was not liable to the plaintiff, there being no evidence that the defendant by any act of his own or by the neglect

(1) [1907] 2 K. B. 345.
(2) (1909) 100 L. T. 280.
(3) (1911) 106 L. T. 123.
(4) (1911) 106 L. T. 51.

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of any duty had caused an obstruction in the highway by his cattle. Vaughan Williams L.J. appears to have taken the view in that case that if an obstruction of the highway is caused by a number of cattle and a person is injured thereby the owner may be liable. Kennedy L.J. said that he would "be slow to infer that because a harmless cow or sheep is allowed to get into the highway without giving rise to a cause of action that rule applies to crowds of cattle whose mass might constitute an obstruction to travellers along the highway." Buckley L.J. expressed the view that, even if it were proved that the cattle escaped into the highway through the defendant's negligence, it was for the plaintiff to establish that the animals were such as would be likely to injure persons being in the highway. He agreed also with the view taken by Bankes J. in *Jones* v. *Lee* (1) that at common law there is no obligation on the owner or occupier of land who depastures cattle near a highway to provide fences so as to prevent the cattle getting into the highway. [*Catchpole* v. *Minster* (2) was also cited.]

In that state of the authorities the county court judge was wrong in holding that there had been any breach of duty on the part of the defendant towards the plaintiffs.

[LUSH J. In view of the provision of s. 25 of the Highway Act, 1864, which provides that if certain animals, including sheep, are found straying on a highway (except where the highway passes over any common or waste or uninclosed ground) the owner of the animals shall be liable to a penalty, can a person put, say, a hundred sheep into an unfenced field adjoining a highway and say that he is not guilty of negligence if they stray on to the road ?]

He is entitled to put the sheep into such a field without breach of duty to any particular person. A farmer does not warrant that his sheep will not stray. In any view no case was set up in the county court of liability resting on the defendant by reason of a breach of s. 25 of the Highway Act, 1864.

J. B. Matthews, K.C., and *Arthur S. Ward*, for the plaintiffs. We formally take the point that a breach of statutory duty followed by damage gives rise to a cause of action, but in view of the authorities that point cannot successfully be maintained in this Court.

(1) 106 L. T. 123. (2) (1913) 109 L. T. 953.

The decisions which require consideration in this case are *Jones* v. *Lee* (1) and *Ellis* v. *Banyard*. (2) *Jones* v. *Lee* (1), although reported later, was decided earlier than *Ellis* v. *Banyard* (2) in the Court of Appeal. In *Jones* v. *Lee* (1) the decision turned upon the fact that the accident was not one which the defendant could have foreseen. Bankes J.'s dictum as to the non-obligation to fence a field adjoining a highway was wholly unnecessary. As to *Ellis* v. *Banyard* (2), we rely on the judgment of Vaughan Williams L.J. where he expressed the view that cattle keepers must see that the highway is not obstructed or rendered dangerous by their cattle. The judgment of Phillimore J. in the same case in the Divisional Court (3) is strongly in the plaintiffs' favour, as it shows that if the present defendant was responsible for the sheep being on the highway he was responsible for the damage sustained by the plaintiffs. As to the other cases cited on behalf of the defendant, the finding of the jury in *Higgins* v. *Searle* (4) that the defendant was not guilty of negligence in allowing the sow to be on the highway prevents that case being any authority against the present plaintiffs. In *Hadwell* v. *Righton* (5) a series of such unlikely things occurred as could not possibly have been foreseen by the owner of the fowl, whereas in this case it is in accordance with their habits for sheep to run after the flock from which they have been separated, and when they do so while on the highway untended, accidents such as that which actually occurred in this case may well be anticipated. The county court judge did not misdirect himself, and having found the facts which he did, his decision should not be interfered with. [*Harris* v. *Mobbs* (6) was also cited.]

Joy, in reply, cited *O'Gorman* v. *O'Gorman*. (7)

Cur. adv. vult.

Nov. 26. The following judgments were read :—

AVORY J. The plaintiffs are the owners of a motor car which was being driven along a highway in the daylight at a rate of sixteen to

(1) 106 L. T. 123.
(2) 106 L. T. 51.
(3) (1911) 104 L. T. 460, 461.
(4) 100 L. T. 280.
(5) [1907] 2 K. B. 345.
(6) (1878) 3 Ex. D. 268.
(7) [1903] 2 I. R. 573.

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twenty miles an hour. The driver saw in front of him on the road a number, about twenty, of sheep unattended. As he proceeded, one or more sheep that were behind the others jumped from the bank on the near side, one of them ran in front of the car, a collision took place whereby the car was overturned and damaged, and the plaintiffs brought this action against the owner of the sheep for damages caused by the negligence of the defendant in allowing them to stray unattended on the highway. The county court judge has given judgment for the plaintiffs, finding that the defendant was the owner of the sheep in question, and holding that the defendant was guilty of negligence in allowing them to stray from a field through an insufficient fence on to the highway, or, rather, as he seems to put it in his judgment, that this misconduct of the defendant amounted to a nuisance on the highway in that it caused obstruction or inconvenience from which an individual has suffered particular damage, and that the accident was the natural consequence of such negligence or nuisance.

For the purposes of my judgment I will assume that there was evidence that the defendant was the owner of the particular sheep that came into collision with the motor car, and that there was evidence of negligence on his part or of a nuisance in allowing the sheep to stray on the highway, but I am unable to agree with the reasoning of the county court judge by which he arrives at the conclusion that such negligence or nuisance was the proximate or effective cause of the damage in this case, or that such damage was the natural consequence of such negligence or nuisance. On the argument before us it was further submitted by Mr. Matthews that the defendant was also liable on another ground, namely, that by allowing the sheep to stray on the highway he had committed a breach of statutory duty under s. 25 of the Highway Act, 1864, for which he had been fined, and the county court judge appears to have been influenced by this point in coming to his decision; but Mr. Matthews admitted that in view of previous decisions, to which I am going to refer, that point was not open to him in this Court. In the view which I take of this case that point is not material.

The principle of law to be applied to the present case appears to

me to be that which was clearly laid down in *Cox* v. *Burbidge* (1), and which has since been adopted in several cases, such as *Hadwell* v. *Righton* (2), *Bradley* v. *Wallaces* (3), *Higgins* v. *Searle* (4), *Jones* v. *Lee* (5), and *Ellis* v. *Banyard.* (6)

In *Cox* v. *Burbidge* (1) the declaration was for negligence in allowing the horse to stray upon the highway. Counsel for the plaintiff in showing cause against the rule to enter a nonsuit relied on the three points (1.) that the defendant was guilty of negligence, (2.) that he was guilty of a breach of the Highway Act, and (3.) that the presence of the horse on the highway under the circumstances constituted a common nuisance. Erle C.J. at p. 436 said, "The question . . . . whether [the] owner [of the horse] was amenable under the Highway Act, has nothing to do with the case of the plaintiff"; and on the same page, "Even if there was any negligence on the part of the owner of the horse, I do not see how that is at all connected with the damage of which the plaintiff complains." Willes J. at p. 439 laid down the principle applicable to such cases upon which the Court acted, namely, "As to animals which are not naturally of a mischievous disposition, the owner is not responsible for injuries of a personal nature done by them, unless they are shown to have acquired some vicious or mischievous habit or propensity, and the owner is shown to have been aware of the fact." There can be no question that sheep are within the category of animals mansuetae naturae, but the county court judge has found as a fact, if it be a question of fact, that it is the natural tendency of sheep which are untended to run across, or otherwise endanger, vehicles on the road, and that it is a matter of common knowledge that sheep, finding themselves separated from the bulk of the flock, have almost a mania for rejoining it and are perfectly regardless of intervening traffic. As to the latter finding I should have thought, as a matter of common knowledge, it was more likely that the isolated sheep would have run ahead to join the others in the road instead of trying to get back into the field; but however this may be, and assuming that the county court judge is to be taken as finding that the defendant knew of these tendencies

(1) 13 C. B. (N.S.) 430.
(2) [1907] 2 K. B. 345.
(3) [1913] 3 K. B. 629.
(4) 100 L. T. 280.
(5) 106 L. T. 123.
(6) 106 L. T. 51.

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in sheep, I do not think they are "a vicious or mischievous propensity" within the meaning of the decided cases, and I cannot agree with the county court judge that the accident was the natural consequence of the sheep being on the highway. It is not in my opinion sufficient to say that it is to be expected if sheep get on to the road they will very likely interfere with and endanger the traffic. If everybody knows this, the driver of a vehicle on the road knows it, and if he sees sheep on the road, whether tended or untended, and whether he be the driver of a motor car or of a horse, he must take care to avoid the danger. In my opinion, whether the case be put on the ground of negligence or nuisance or breach of a statutory duty, the accident was caused either by the default of the driver of the car to avoid the sheep, or by an intervening act of the sheep which the defendant as a reasonable man would not anticipate. I think the case is governed by *Cox* v. *Burbidge* (1), and that there is no evidence of a vicious or mischievous propensity on the part of the sheep to upset motor cars, or of the knowledge of the defendant of any such propensity so as to bring it within the principle there laid down, and that judgment should be entered for the defendant.

LUSH J. In this case some sheep of the defendant strayed from a field adjoining the highway owing to the hedge not being adequate. Two of them having become separated from the others suddenly jumped off a bank. One of them ran against the plaintiffs' motor car, which was travelling at fifteen or sixteen miles an hour, injured the steering apparatus, and so caused the driver to lose control. The car was damaged. The plaintiffs sued the defendant, and the learned judge held that the defendant was liable and gave judgment for him for 100*l.* damages.

I do not understand the learned judge to have found in express terms that the defendant, the owner of the sheep, was negligent in allowing the fence to become inadequate. He based his judgment apparently on an absolute duty to fence the sheep in. He did not also in express terms find that there was no contributory negligence on the part of the plaintiffs, the owners of the car. I think, however,

(1) 13 C. B. (N.S.) 430.

that we ought to treat the judgment as including a finding of negligence on the part of the defendant and a finding that there was no contributory negligence on the part of the plaintiffs. Both these findings, if not involved in the judgment, follow, I think, by way of necessary inference from the facts that were found or from the undisputed facts. The decision is one of considerable importance. In his clear and closely reasoned judgment the learned judge arrived at his conclusion by a series of apparently logical steps, each of which has been criticized by Mr. Joy on behalf of the defendant. The first step is this. Sect. 25 of the Highway Act, 1864, makes it unlawful, except where there are commons or wastes or uninclosed grounds, to allow animals to stray on to the highway, and the owner is liable to a fine if he does so. Having regard to that enactment, and, indeed, apart from it, the learned judge held that in districts other than those where there are common lands the owner of land adjoining the highway is under a duty, for the purpose of civil proceedings, to maintain an adequate fence and prevent his sheep from straying. It is not open to us, having regard to the judgments in *Cox* v. *Burbidge* (1) and *Higgins* v. *Searle* (2), so to hold in the absence of negligence, even if we were inclined to do so. Treating the judgment as including a finding of negligence, I agree that there is a duty to take reasonable care to keep sheep from straying. Different views have been expressed in recent cases upon this subject, and I am therefore at liberty to express my own view with regard to it. Bankes J., as he then was, in *Jones* v. *Lee* (3) and Buckley L.J. in *Ellis* v. *Banyard* (4) thought there was no common law duty. Vaughan Williams L.J. in the latter case thought that there was, at all events, a duty not to allow animals to stray in such numbers as to cause a substantial obstruction. Phillimore J. and Horridge J. in that case (5) apparently shared the latter view, as they seem to have assumed that if the defendant, a farmer, had negligently left his gate open and allowed his animals to stray he would have been liable. To turn sheep into a field in ordinary districts without a fence, or with a fence known to be defective, so that they would in the ordinary

(1) 13 C. B. (N.S.) 430.
(2) 100 L. T. 280.
(3) 106 L. T. 123.
(4) 106 L. T. 51.
(5) 104 L. T. 460.

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course stray on to the highway, would, it seems to me, be doing that which would in the ordinary course of things tend to cause a nuisance on the highway, and I cannot for myself see how such an act can be lawful. If it were, a farmer could keep his gate open though he knew that the consequence would be that the highway might be obstructed. With regard to open or common lands the case, I agree, is different. Sect. 25 of the Highway Act, 1864, as I have said, excepts such cases as those. The risk of mischief resulting is very different in such cases, as sheep would naturally not remain on the highway, whereas in ordinary districts they could not get off it unless they found open gates or gaps in other hedges. I agree also with the conclusion that the sheep in this case did not do that which caused the accident through any vicious or mischievous tendency, which is what I gather is what the learned judge meant when he said that they jumped from the bank and ran across the road following their natural tendency. With the last and important step, however, namely, that the accident was the direct and natural consequence of the defendant's breach of duty in not taking reasonable care to maintain an adequate fence, I do not, with all respect to the learned judge, agree. Most of the cases that were cited to us, commencing with *Cox* v. *Burbidge* (1), were no doubt cases where the animal showed some vicious propensity not known to the owner, and the Court held that an accident so caused by an unexpected act of that kind was not the natural and ordinary consequence, or the direct and natural consequence, of the owner's breach of duty in allowing it to be on the highway or on the premises in question. The ground, however, of those decisions in my opinion was that it is only where the owner ought to have anticipated from the known tendency of the animal that it was likely to do what it did, and that such an accident was likely to occur, that it can be said to be the natural and ordinary consequence of the wrongful act in allowing it to stray. In *Cox* v. *Burbidge* (1) the Court I think treated the case as depending on that principle. The principle acted on was this, that the damage must be of such a nature as is likely to arise from such an animal, and the owner must know it. The judgments of Phillimore J. and Bray J. in *Hadwell* v.

(1) 13 C. B. (N.S.) 430.

Righton (1) seem to me to involve the same proposition. Bray J. in that case said that in the absence of anticipated danger there is no room for the suggestion of negligence. In *Jones* v. *Lee* (2) and *Bradley* v. *Wallaces* (3) a similar test was applied. This may appear to involve an application to a case of tort of the principle as to remoteness of damage which is generally confined to cases of breach of contract. The question whether the damage flowed from the breach and was within the contemplation of the parties is no doubt relevant only to cases of the latter kind. But, inasmuch as the test in cases of tort is whether the damage was the natural and ordinary consequence of the tort, one must, in dealing with cases of this special class,—cases of damage caused by animals mansuetae naturae—consider what an animal of that particular kind may naturally be expected to do if it strays, and whether the accident was one that was likely to occur. Now, can it be truly said that a person who keeps sheep in his field and does not properly keep up his fence ought to anticipate that a sheep might stray and by running into a car which could not avoid it at the speed at which it was travelling cause such an accident as was caused here? I think that it is unreasonable so to hold. The occurrence was, I think, really a pure accident so far as the defendant was concerned. His omission to keep his hedge in order was a causa sine qua non, but it was not the proximate cause of the accident. The accident arose from a combination of causes, including the rapid, though not in law excessive, speed at which the plaintiffs' car was travelling. It may well be that if sheep are allowed to stray through defective fencing and be on the road at night, and the driver of a cart or motor car, driving with due regard to all such possible risks, were to run against them in the dark, the negligent owner of the sheep would be liable. But if the driver, either by night or by day, drives so fast that if a sheep suddenly emerges from the side of the road and runs against his car he cannot avoid an accident, he cannot rightly say that the real and effective cause of the accident was the carelessness of the owner of the sheep in allowing them to stray.

In my opinion the damage was too remote, and the appeal,

(1) [1907] 2 K. B. 345. (2) 106 L. T. 123.
(3) [1913] 3 K.B. 629.

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therefore, ought, I think, to be allowed, and judgment entered for the defendant.

Appeal allowed.

Solicitors for plaintiffs: *Clifford Turner & Hopton, for W. J. Rabnett, Birmingham.*

Solicitors for defendant: *Griffith & Gardiner, for Maddocks, Ogden & Co., Coventry.*

J. S. H.

1915

Dec. 8.

FAIRBURN *v.* EVANS.

Sunday Observance—Purchase from Refreshment House Keeper on Sunday—Knowledge that Refreshment House Keeper had committed Offence of exercising his Ordinary Calling on Sunday—Aiding and abetting Commission of Offence—Sunday Observance Act, 1677 (29 *Car.* 2, *c.* 7), *s.* 1—*Summary Jurisdiction Act,* 1848 (11 *& 12 Vict. c.* 43), *s.* 5.

The appellant purchased sweets from a refreshment house keeper on a Sunday and took them from the premises for consumption. At the time of his purchase the appellant knew that the refreshment house keeper was exercising his ordinary calling on the Sunday and that he had constantly been convicted of having done so on previous occasions under the Sunday Observance Act, 1677 :—

Held, that the appellant could be convicted of aiding and abetting the refreshment house keeper in the exercise of his ordinary calling in contravention of the Act of 1677.

CASE stated by justices of Ammanford, in the county of Carmarthen.

An information was preferred by the respondent, the deputy chief constable, under s. 1 of the Sunday Observance Act, 1677 (1), against the appellant, for that he, on February 14, 1915, being the Lord's Day, was unlawfully present aiding and abetting one Eugenio Cresci unlawfully to do and exercise certain worldly labour, business,

(1) The Sunday Observance Act, 1677 (29 Car. 2, c. 7), s. 1, provides that no tradesmen or others "shall do or exercise any worldly labour, business or work of their ordinary callings, upon the Lord's Day, or any part thereof (works of necessity and charity only excepted)."

and work in his ordinary calling of a refreshment house keeper, the same not being a work of necessity or charity.

At the hearing the following facts were proved or admitted :—

(*a*) On Sunday, February 14, 1915, Eugenio Cresci, in his ordinary calling as a refreshment house keeper, sold to the appellant sweets to the value of 3*d*., which the appellant paid for and took off the premises for consumption.

(*b*) Prior to the conviction of the appellant, Eugenio Cresci was convicted on February 22, 1915, at the said Court, under s. 1 of the Sunday Observance Act, 1677, for doing work in his ordinary calling by selling the said sweets to the appellant on February 14.

(*c*) The appellant resided at Ammanford, and his ordinary calling was that of an electric pumpman at a colliery.

(*d*) On several previous occasions, both on Sundays and weekdays, the appellant had made purchases from Eugenio Cresci in the ordinary course of his calling as a refreshment house keeper at his premises.

(*e*) The appellant admitted that he knew prior to and at the time of the offence that Eugenio Cresci was carrying on his ordinary calling of a refreshment house keeper on the Lord's Day, and that Eugenio Cresci had been constantly convicted of so doing.

For the appellant it was contended—

(1.) That his act in purchasing the sweets from Eugenio Cresci was not aiding and abetting him to do or exercise any worldly labour, business, or work of his ordinary calling.

(2.) That an aider and abettor is a principal, and that, if convicted, the appellant would be convicted of purchasing, though he could not be convicted of selling, inasmuch as selling would not be carrying on his ordinary calling.

(3.) That there was no evidence of mens rea on his part.

(4.) That in any case he had not committed any offence.

The respondent contended—

(1.) That an aider and abettor does not commit the same offence as the principal, and although in misdemeanours he is a principal, nevertheless he is merely liable on conviction to the same punishment as the principal offender.

(2.) That it was unnecessary to prove mens rea, as every one is presumed to know the law, and, furthermore, that guilty knowledge

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was not essential under s. 1 of the Sunday Observance Act, 1677. Further, there was evidence of mens rea, as it was proved by the prosecution, and admitted by the appellant, that he had often made purchases from Eugenio Cresci before, and knew, prior to the commission of the said offence, that Eugenio Cresci had been constantly convicted at the same Court for carrying on his ordinary calling of a refreshment house keeper on the Lord's Day.

The justices were of opinion that upon the above facts the appellant did aid and abet Eugenio Cresci in the commission of the offence of which the said Eugenio Cresci was convicted within the meaning of s. 5 of the Summary Jurisdiction Act, 1848 (1), and they accordingly convicted him and fined him in the sum of 5*s*.

Rigby Swift, K.C. (*Marlay Samson* and *L. H. Barnes* with him), for the appellant. Till *Chivers* v. *Hand* (2) it had never been suggested that a person who merely buys an article in a shop on a Sunday aids and abets the shopkeeper in committing an offence against the Act of 1677, and in *Chivers* v. *Hand* (2) it was found unnecessary to decide the point. The appellant committed no offence. By merely buying goods he no more assisted the refreshment house keeper in exercising his ordinary calling, that is in conducting his business on the Sunday, than he assisted him by making purchases at his shop on a weekday. If the appellant had persuaded the refreshment house keeper to open his shop specially to serve him the position might have been different, but for the appellant merely to make a purchase in a shop already open cannot be aiding and abetting the shopkeeper in exercising his ordinary calling on the Sunday. Cresci committed an offence by opening his shop with the intention of serving any customers who might come, even if no customers in fact came. In *Jenks* v. *Turpin* (3) Hawkins J. at p. 526 said that persons who played at baccarat

(1) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 5 : ". . . . Every person who shall aid, abet, counsel, or procure the commission of any offence which is . . . . punishable on summary conviction shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable on conviction to the same forfeiture and punishment as such principal offender is . . . . by law liable . . . . "

(2) (1914) 84 L. J. (K.B.) 304.

(3) (1884) 13 Q. B. D. 505.

in a club did not thereby take "any part in the care or management of it. A customer who buys an article at a shop might just as well be said to assist in conducting the business of the shop." A. L. Smith J. in the same case at p. 534 said: "If a man goes into a shop and buys an article therein, can it be said that he is assisting in conducting the business of the shop? He certainly, as it seems to me, avails himself of the business there carried on; but, does he assist in conducting the business there carried on? I think not." Those observations are directly in point.

[Low J. The mere sale of certain kinds of books is made punishable. Has a purchaser of a book of that class ever been prosecuted?]

No. The purchase is often made for the very purpose of a prosecution. Furthermore, the appellant could not have committed the offence committed by Cresci.

[Low J. A person may be an aider and abettor although he cannot commit the original offence. It has been held that a woman can be indicted for aiding and abetting the crime of rape.]

Here the appellant has not been convicted of counselling or procuring the commission of the offence against the Act of 1677, and what he did was not aiding and abetting its commission. [He also cited *Crepps* v. *Durden*. (1)]

Clive Lawrence (*Trevor H. Hunter* with him), for the respondent. The conviction was right. The refreshment house keeper exercises his calling to effect sales, and by purchasing from him on a Sunday the appellant aided and abetted him in the commission of an offence. *Jenks* v. *Turpin* (2) has no application to this case; the observations relied on of Hawkins J. and A. L. Smith J. were not made in reference to customers going to a shop where business was carried on in breach of the Sunday Observance Act, 1677.

Rigby Swift, K.C., replied.

RIDLEY J., after stating the facts, continued: If there was evidence before the justices upon which they could come to the conclusion that the appellant committed the offence charged against him we cannot interfere. Mr. Rigby Swift, for the appellant, referred to *Chivers* v. *Hand* (3), which was decided under the same

(1) (1777) 2 Cowp. 640. (2) 13 Q. B. D. 505.
(3) 84 L. J. (K.B.) 304.

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Ridley J.

statute. In that case it was held that the appellant, who went into an eating house and bought a pennyworth of cigarettes, did not aid and abet the eating house keeper in exercising his ordinary calling on the Lord's Day. That decision I think was right, because there was no finding in that case that the appellant knew that the eating house keeper was exercising his ordinary calling on the Sunday, whereas here there is such a finding. In *Chivers* v. *Hand* (1) Lord Coleridge J. said: "In my opinion, in the absence of any finding by the justices that the appellant knew that the vendor was carrying on his ordinary calling on a Sunday, there is nothing to show a mens rea on the part of the appellant." In this case we have the finding that the appellant knew that Cresci was exercising his ordinary calling on the Sunday. It is quite true that the appellant was not assisting in selling—that is not the charge made against him; but if a person goes to a shop in the guise of a customer and—I use a neutral word—assists a person who is exercising his business on the Sunday with the knowledge that he is doing so and buys goods, the justices may come to the conclusion that the buyer is aiding and abetting the shopkeeper in exercising his ordinary calling on the Lord's Day. As to the case of *Jenks* v. *Turpin* (2), where it was held that some members of a club who had been playing baccarat could not be convicted of having assisted in the conduct of the club, I can well understand the reason of that decision. The mere fact that a person is gambling does not show that he has been assisting in the management of the club; but that decision does not apply to the present case, because here the charge was not assisting Cresci in the management of his establishment, but assisting him in exercising his ordinary calling upon the Lord's Day. It is in quite a different sense that these words are used: they do not import an actual assistance in carrying on or conducting the establishment; they point merely to a connivance or procuring of Cresci in exercising his ordinary calling on the Lord's Day. I think, therefore, that there was evidence upon which the justices were entitled to come to the conclusion that the appellant was guilty of aiding and abetting Cresci, and we cannot therefore interfere with their decision. The appeal must be dismissed.

(1) 84 L. J. (K.B.) 304. (2) 13 Q. B. D. 505.

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LUSH J. I come to the same conclusion though with some hesitation. I do not see my way to hold that there was no evidence upon which the justices could find that the appellant was guilty of aiding and abetting. The charge was that the appellant aided and abetted Cresci in exercising his ordinary calling on the Lord's Day, and that, I think, is the same in substance as a charge that he had procured or instigated Cresci to commit a breach of the statute. The appellant knew that Cresci was exercising his ordinary calling on that Sunday; he knew that in doing so Cresci was doing an unlawful act; and he went into the shop and procured Cresci to sell goods to be removed from the premises, which sale, in my view, was an unlawful act. Mr. Rigby Swift says that Cresci's offence was complete apart from this sale to the appellant. I agree that it was. Exercising the ordinary calling on the Sunday is the offence created by the statute, and the person committing it cannot be convicted of more than one offence on one Sunday although he sells several articles at different times on the Sunday. Where the exercising of an ordinary calling consists of a series of acts each of which is unlawful and each of which goes to make up the offence, I do not see how it can be right to say that if a person instigates or procures another to do one of a series of acts which together constitute the offence he can be said not to commit the offence of aiding and abetting. I think there was evidence upon which the justices could say that the appellant procured or instigated or aided and abetted Cresci in the commission of the offence.

LOW J. I agree that on the facts of this particular case there was evidence upon which the justices could convict, but I am bound to say that I come to that conclusion with very great hesitation.

Appeal dismissed.

Solicitors for appellant: *Smith, Rundell & Dods, for Samuel Griffith & Noyes, Ammanford.*

Solicitors for respondent: *George Williams & Hurley, Llandilo.*

J. S. H.

1915
Dec. 10.

SWALLOW *v.* LONDON COUNTY COUNCIL.

Weights and Measures—Coal—Refusal by Carman to assist in weighing Coal—"Obstructing of the weighing"—Weights and Measures Act, 1889 (52 & 53 *Vict. c.* 21), *s.* 27.

Under s. 27 of the Weights and Measures Act, 1889, the person in charge of a vehicle in which coal is carried is under no obligation to weigh or assist in weighing the coal carried in the vehicle. The mere refusal, therefore, by him to assist in weighing the coal, although required to do so by an officer of the local authority, does not constitute an obstruction of the weighing within sub-s. 2 of s. 27.

CASE stated by a metropolitan police magistrate.

On June 9, 1915, an information was heard which had been preferred on behalf of the London County Council (hereinafter called the respondents) against John Swallow (hereinafter called the appellant) charging him, under the Weights and Measures Act, 1889, with having on May 3, 1915, at St. John Street Road, Clerkenwell, obstructed the weighing of coal.

At the hearing the following facts were proved or admitted :—

On May 3, 1915, Edward Henry Pineles, an officer appointed for the purpose by the respondents, the local authority within s. 27 of the Weights and Measures Act, 1889, saw the appellant in charge of a van containing a load of coal in casks, close to the premises of the Cannon Brewery Company, which coal the appellant was about to deliver there. Pineles required that the coal should be weighed by a duly stamped instrument which he there had with him for the purpose of weighing the same, and for that purpose he requested the appellant to place the coal on the scale of such instrument. The appellant refused to put the coal on the scale or to assist the man by whom Pineles was attended in so doing, but raised no objection to Pineles himself or by his man placing the coal on the scale and weighing it.

On the part of the appellant it was contended that the above facts did not amount to any offence under s. 27 of the Weights and Measures Act, 1889 (1), and that the appellant was under no

(1) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 27, sub-s. 1 : "Any seller or purchaser of coal, person in charge of a vehicle in which coal is carried, inspector of weights and measures, or

obligation to take any active step in connection with the weighing of the coal.

On the part of the respondents it was contended that the refusal of the appellant to put or assist in putting the coal on the scales amounted to an unlawful obstruction of the weighing.

The magistrate was of opinion that the word "require" in s. 27 implied a command, and the refusal to obey was disobedience to a lawful order which on the facts mentioned amounted to an unlawful obstruction of the officer duly appointed by the local authority, and the magistrate accordingly convicted the appellant.

The question for the opinion of the Court was whether the magistrate was right in law.

Disturnal, K.C. (*Morle* and *Cartwright Sharp* with him), for the appellant. Sect. 27 of the Weights and Measures Act, 1889, imposes no duty on the carman to weigh the coal. This is quite clear by contrasting its language with that of sub-s. 2 of s. 26, where the Legislature has enacted that "if the keeper of any . . . . fixed weighing instrument refuses, without reasonable excuse, to weigh or re-weigh any vehicle or coal" he shall be liable to a penalty. No such language appears in s. 27. In the absence of

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other officer appointed for the purpose by the local authority, may require that any coal or any vehicle used for the carriage of coal in bulk be weighed or re-weighed by any weighing instrument stamped by an inspector of weights and measures.

"Provided as follows:

"(*a*) No seller of coal or person in charge of a vehicle in which coal is carried shall be required under this section to carry coal beyond such distance, not exceeding half a mile, as may be prescribed in that behalf by the local authority.

"(*b*) Where any such coal or vehicle has at the instance of the purchaser been weighed or re-weighed in pursuance of this section, and found to be of the weight stated in that behalf by the seller of the coal or the person in charge of the vehicle, the purchaser shall be liable to the payment of all reasonable costs actually incurred of and incidental to the weighing or re-weighing."

Sub-s. 2: "If any person obstructs any weighing or re-weighing authorised by this section he shall be liable to a fine not exceeding five pounds."

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any duty on the appellant to weigh the coal, the fact that he refused to assist in the weighing cannot be "obstruction." He was no more obliged to give assistance than was any passer-by. "Obstruction" in the sub-section involves active opposition to the weighing.

[He was stopped.]

Daldy, for the respondents. Sect. 27 occurs in a group of sections dealing with the sale of coal the object of which is to prevent fraud in connection with its sale. Under s. 27 there is power to require the coal to be weighed, and it is not correct to say that no obligation is cast upon the person in charge of the vehicle containing coal. The carman may be required to drive half a mile to a weighing machine. If he refused to do so he would certainly be guilty of obstruction within sub-s. 2; and it is a legitimate inference from the whole tenor of the section that he is bound to assist in the weighing, and that if he refuses to do so he is obstructing the weighing.

[LUSH J. Under s. 32, which relates to the sale of bread, an obligation is expressly imposed upon the seller to weigh bread if requested to do so. There is no similar enactment in s. 27.]

Sub-s. 2 is the only clause in s. 27 which in terms secures the carrying out of the duty of weighing the coal. If the carman refuses to assist it may be impossible to carry out the weighing; the weighing is in such circumstances obstructed. It is not necessary that there should be active opposition on his part to constitute obstruction within the meaning of the sub-section. [He referred to *Alty* v. *Farrell*. (1)]

RIDLEY J. In this case the appellant, who was in charge of a coal van, did not, when required to do so, assist in the weighing of the coal, but simply stood by and did nothing. The magistrate took the view that the appellant's refusal to assist in the weighing of the coal amounted to an obstruction of the weighing within sub-s. 2 of s. 27. The substantial difficulty in the way of Mr. Daldy, who argued the case on behalf of the respondents very clearly, is that the appellant did nothing to prevent the weighing of the coal. If the statute had made it an offence to refuse to weigh the coal,

(1) [1896] 1 Q. B. 636.

the appellant would then have been in the same position as is the seller of bread under s. 32; and in that case it might be said, using the word somewhat technically, that to refuse to weigh might be obstructing the weighing. But s. 27 does not go as far as s. 32; the Legislature appears to have deliberately refrained from saying that the person in charge of a vehicle and delivering coal is to take a part in the weighing thereof. Why it should have so refrained I do not know. Sect. 27 contains a provision that the seller of coal or person in charge of a vehicle in which coal is carried shall not be required to go beyond a certain distance when the coal is to be weighed. There is no connection between that and the weighing, which is not by this section put upon the carman at all. In these circumstances it appears to me that the Legislature has not passed such an enactment as makes it an obstruction within the proper meaning of that word for the carman to do what he did in this case, namely, stand by and do nothing. In practice I suppose that when the coal is required to be weighed it is carried out with the assistance of the man who brings the coal, but that has no bearing on the point we have to determine. It seems to me that the appellant committed no offence when he stood by and refused to assist in the weighing. That being so, I think the magistrate was wrong, and that the conviction must be quashed.

LUSH J. If the Legislature had intended to impose upon the carman the duty of weighing coal—by that I mean the taking of an active part in the weighing—and had intended to make him liable to a penalty if he refused, it would have been very easy to use language enacting this in clear terms. If one looks at s. 25, where the Legislature has put upon the seller the duty of weighing coal it has said so in terms; that section deals with the sale in small quantities of coal for delivery at the place where it is kept for sale, and it says that the seller shall, if so required by the purchaser or inspector, weigh any coal before the sale or delivery thereof. Contrast that language with that of s. 27, where not a word is said to the effect that the seller by his servant shall weigh the coal. Again, the language of sub-s. 2 of s. 27, the sub-section which imposes the penalty, is, not if any person refuses to weigh, which is the expression used in s. 26 where the duty to weigh is imposed, and in s. 32,

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Lush J.

where the duty to weigh is imposed upon bakers, but "if any person obstructs any weighing or re-weighing authorised by this section he shall be liable to a fine." The contrast again is most marked because in the other cases I have mentioned the duty to weigh is imposed; in s. 27 it is not. In my opinion, in order to expose a person to the penalty under sub-s. 2 of s. 27 there must be an active obstruction by him of the person who is weighing the coal. Here there was no obstruction if by obstruction is meant actively putting an obstacle in the way of the person wishing to weigh the coal. Although it is conceivable that the expression "obstruction" might have been used in reference to what the appellant did, if a duty to weigh had been cast upon him, it is impossible to say, where no duty to weigh is imposed upon him, that he is guilty of obstructing the weighing by refusing to assist in the weighing. Mr. Daldy referred to the case of *Alty* v. *Farrell*. (1) There a local authority made a by-law which required every person in charge of a vehicle carrying coal for sale in small quantities to carry a perfect weighing instrument of an approved form and re-weigh the coal on being requested to do so by any purchaser, or by any one on behalf of the purchaser, or by an inspector of weights and measures, or by any constable. The Court held that the by-law was unreasonable. Lord Russell of Killowen C.J. was content to put his judgment upon the ground that the by-law might necessitate several weighings, and also that to authorize any constable to require the carman to weigh the coal was unreasonable. Wright J. expressed a doubt whether the by-law was good on other grounds. But if one looks at the earlier case of *Kent County Council* v. *Humphrey* (2), which was cited in *Alty* v. *Farrell* (1), it will be seen that it was thought doubtful whether the power to make a by-law that the carman should weigh the coal was intra vires. There the by-law said that "every coal dealer shall provide, and every person employed by him who shall convey or carry coal for sale or delivery to a purchaser from or out of any vehicle shall carry therewith, a correct and stamped weighing machine of the form approved by the county council, and such person shall re-weigh the coal upon being requested to do so." The by-law therefore imposed a duty upon the carman to re-weigh. It is true that the Court did not say that it was ultra vires. Charles J.

(1) [1896] 1 Q. B. 636. (2) [1895] 1 Q. B. 903.

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Lush J.

held that the first part of the by-law was good, but he said (p. 906): "It is not necessary for us to give any opinion as to whether the latter clause in the by-law may or may not be ultra vires, because the earlier clause, on which the charge against the respondent was founded, is clearly good." Wright J. said: "It may well be that the provision authorizing the making of a by-law directing that an instrument shall be carried has the effect of authorizing a by-law directing that such instrument shall be used. It is unnecessary, however, for the purposes of our decision, to say more than that the first part of the by-law is valid." The Court therefore left the question open whether the local authority could properly impose the duty of re-weighing upon the carman, but if a by-law is necessary for that purpose it seems to me to follow that the section does not impose the duty. I agree, therefore, that the conviction was wrong and must be quashed.

Low J. In the absence of anything in the statute to show that there is a liability on the part of the carman to do the act which he refused to do, it would be a mere abuse of language to call what happened in this case "obstruction." I agree that the conviction should be quashed.

Appeal allowed.

Solicitor for appellant: *Geoffrey B. Gush.*
Solicitor for respondents: *E. Tanner.*

J. S. H.

1915
Nov. 24.

BLOUNT *v.* BLOUNT.

[1915 B. 2015.]

Revenue—Income Tax — Deduction — Covenant — Annual Payment — Permanent Maintenance—"Free of income tax"—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *ss.* 102, 103—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 40.

By an order made by consent by the President of the Divorce Division after a decree absolute for the dissolution of the plaintiff's marriage with the defendant, the defendant was ordered to pay to the plaintiff permanent maintenance at the rate of 62*l.* 10*s.* per quarter "free of income tax"; and by a deed of the same date, which recited the order, the defendant covenanted to pay to the plaintiff "during her life the quarterly sum of 62*l.* 10*s.* (free of income tax)." The plaintiff sued the defendant to recover the amount of the income tax on one quarter's payment which the defendant had deducted:—

Held, that the covenant to pay the quarterly sum "free of income tax" was void under s. 103 of the Income Tax Act, 1842, and that the defendant was therefore entitled to make the deduction.

In re Barry's Trusts [1906] 1 Ch. 768; [1906] 2 Ch. 358, followed.

Action tried without a jury.

The plaintiff, having obtained a decree absolute for the dissolution of her marriage with the defendant, presented a petition for permanent maintenance, on which the President made an order, by consent, on December 22, 1910, by which the defendant was ordered to pay to the plaintiff "permanent maintenance at and after the rate of 62*l.* 10*s.* per quarter (free of income tax)." By an indenture dated December 22, 1910, which recited the order, the defendant covenanted to pay to the plaintiff "during her life the quarterly sum of 62*l.* 10*s.* free of income tax," and the indenture provided that the said quarterly sum should be in full discharge of all claims present and future by the plaintiff against the defendant in respect of maintenance and in respect of the debts and liabilities theretofore or thereafter incurred by her.

This action was brought to recover the sum of 20*l.* 16*s.* 8*d.* which the defendant had deducted from the quarterly payment due on March 25, 1915, for income tax, being as to 5*l.* 4*s.* 2*d.* the income tax payable upon the instalment payable on that date, and as to

15*l.* 2*s.* 8*d.* being the income tax in respect of the three previous instalments.

The defendant claimed to be entitled to make the deduction on the ground that by s. 103 of the Income Tax Act, 1842 (1), the covenant to make the payment in full without deducting income tax was void, and that under s. 102 of that Act and s. 40 of the Income Tax Act, 1853, he was authorized to make the deduction; but the defendant had paid the 15*l.* 2*s.* 8*d.* into Court with a denial of liability, and it was not contended at the trial that he was entitled to deduct from one quarterly payment income tax in respect of instalments previously paid.

A. M. Latter, for the plaintiff. It is clear from the language both of the order and of the covenant that the intention was that the plaintiff should receive the full amount of 62*l.* 10*s.* quarterly. The only reason for having the covenant as well as the order was that an order of the Divorce Court for the payment of maintenance cannot be enforced by an action in the King's Bench Division: *Ivimey* v. *Ivimey*. (2) If proceedings were taken in the Divorce Court to enforce the order the defendant could not justify the deduction of income tax, for the order is not within s. 103 of the Income Tax Act, 1842. The covenant should, if possible, be construed so as to carry into effect the order and the intention of the parties. It may be regarded as a covenant to pay such a sum as will after the payment of income tax produce the clear sum of 62*l.* 10*s.* quarterly. A covenant to that effect would not be a contravention of s. 103: *Colbron* v. *Travers* (3); *Beadel* v. *Pitt*. (4) It is possible to provide for the payment of an annuity free of income tax: *In re Parker-Jervis* (5), per Kekewich J. Further, sums due under a covenant for maintenance arising out of an order of the Divorce Court are lawfully payable without deduction of the income tax, because the practice of the Divorce Court in arriving at the amount to be paid

(1) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 103: ". . . .; and all contracts, covenants, and agreements made or entered into, or to be made or entered into, for payment of any interest, rent, or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void."

(2) [1908] 2 K. B. 260.

(3) (1862) 12 C. B. (N.S.) 181.

(4) (1865) 13 W. R. 287.

(5) [1898] 2 Ch. 643, at p. 652.

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for maintenance is to take the total net income of both parties after paying income tax and to award to the wife a certain proportion of the joint income so arrived at: see *Frankfort* v. *Frankfort* (1), where this question was considered by Sir Herbert Jenner Fust, and he pointed out that if the tax were deducted from the alimony the effect would be to make the wife pay twice over. In *In re Barry's Trusts* (2) Kekewich J. held that permanent alimony under a deed of separation was payable less income tax, but in that case there had been no order of the Divorce Court, and Kekewich J., referring to *Frankfort* v. *Frankfort* (1), said that possibly an entirely different rule was applicable where there was an order of the Divorce Court. The case went to the Court of Appeal (3), where Vaughan Williams L.J. said that the practice of the Court as regards alimony did not touch the case in the slightest degree, and the decision of Kekewich J. was affirmed. In *Warren* v. *Warren* (4), a previous decision of Kekewich J., there was an order of the Court for maintenance, and a deed carrying the order into effect, but there was no covenant to pay free of income tax. Lastly, in *Shrewsbury* v. *Shrewsbury* (5) the question came before Kennedy J. In that case there had been no divorce proceedings, but a voluntary deed of separation contained a covenant to pay the wife an allowance "clear of all deductions," and it was held that income tax must be deducted. There is, therefore, no authority directly in point in the present case, and, having regard to the practice of the Divorce Court, as stated in *Frankfort* v. *Frankfort* (1), the case should be treated as one in which the income tax has been deducted before the quarterly payment is made.

du Parcq, for the defendant. The effect of the decision of Kekewich J. and the Court of Appeal in *In re Barry's Trusts* (6) is that, whatever may be the terms of an order of the Divorce Court as to permanent maintenance, if the parties subsequently enter into a voluntary deed by which the husband covenants to pay maintenance, of a specified amount, and an action is brought in the King's Bench Division on the covenant in the deed, the Court, in

(1) (1845) 4 Notes of Cases, 280.
(2) [1906] 1 Ch. 768.
(3) [1906] 2 Ch. 358.
(4) (1895) 72 L. T. 628; 43 W. R. 490.
(5) (1906) 22 Times L. R. 598.
(6) [1906] 1 Ch. 768; [1906] 2 Ch. 358.

construing the covenant, will not take into consideration the practice of the Divorce Court, whatever it may be, as to awarding maintenance. The language of the deed, and nothing else, must be looked at. This deed is clearly within s. 103, and the covenant to pay the quarterly instalments free of income tax is therefore void. It is said that the deed might have been so drawn as to have prevented it from coming within s. 103. That argument was also urged, but without success, in *Shrewsbury* v. *Shrewsbury*. (1) [He also referred to *Attorney-General* v. *Shield*. (2)]

A. M. Latter replied.

SCRUTTON J. This case has been very well argued by counsel on both sides, and I do not think I shall gain any advantage by taking time to consider my decision. The plaintiff brings this action to recover from the defendant a sum of 62*l*. 10*s*. due under an indenture dated December 22, 1910, less a sum of 41*l*. 13*s*. 4*d*. already paid. The defendant denies that he is liable to pay the difference, and, alternatively, brings into Court three-quarters of it and says that that is enough to satisfy any sum for which he is liable. It appears that the parties had matrimonial differences and that on December 22, 1910, the President of the Probate, Divorce, and Admiralty Division made an order, by consent, that Mr. Blount should pay to Mrs. Blount " permanent maintenance at and after the rate of 62*l*. 10*s*. per quarter (free of income tax)," and the sum referred to in the writ in this action is one of these quarterly payments. Counsel are agreed that no action could be brought in the King's Bench Division on an order in these terms. The King's Bench Division does not enforce by action orders for maintenance made in the Probate, Divorce, and Admiralty Division. Possibly that was the reason why the parties voluntarily entered into the deed of December 22, 1910, by which the defendant, in pursuance of the agreement and in consideration of the premises, one of which was the order, covenanted with the plaintiff " to pay to her during her life the quarterly sum of 62*l*. 10*s*. (free of income tax)." The existence of that covenant enables Mrs. Blount to sue in the King's Bench Division and to get the benefit of the Order XIV. summary procedure if the sum of 62*l*. 10*s*. were not duly paid, and

(1) 22 Times L. R. 598. (2) (1858) 3 H. & N. 834.

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this action is brought on that covenant. The answer made to the action is that the Court cannot enforce the covenant because it is null and void. There are two sections of the Income Tax Act, 1842, which bear upon the matter. By s. 102 it is provided that upon all annual payments whatever arising out of, inter alia, "a personal debt or obligation by virtue of any contract" a certain sum, which in 1842 was sevenpence and has since become much larger, "shall be charged for every twenty shillings of the annual amount thereof," and the person "so liable to make such payment" is authorized to deduct the tax out of the annual payment when the sum is payable out of profits or gains brought into charge by virtue of the Act of 1842, and in case the sum is payable out of profits and gains not brought into charge under the Act of 1842 the Customs and Inland Revenue Act, 1888, s. 24, sub-s. 3, provides that the person paying is not merely authorized to but "shall" deduct the tax out of the annual payment. It is not suggested that the payment in this case is a payment out of profits not brought into charge, and, therefore, the person paying has a right to deduct the tax but need not do so; and it is quite clear that s. 102 of the Act of 1842 does not in any way interfere with the operation of the covenant in this indenture, because there is nothing in the section to prevent a person who is authorized to deduct the tax from binding himself by contract not to deduct it; and as an illustration of that one may refer to the case, not of a contract, but of a will, by which an annuity may be left free of income tax so that the annuity is paid in full and the income tax is paid by the person liable to pay the annuity. The section relied upon by the defendant in this case is s. 103, the material part of which is in the last sentence: "all contracts, covenants, and agreements made or entered into, or to be made or entered into, for payment of any interest, rent, or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void." The words "such deduction as aforesaid" refer to the words at the beginning of the section, "any deduction authorised to be made by this Act," and refer, among other things, to the deduction authorized to be made by s. 102. The words "or other annual payment aforesaid" refer to the earlier part of s. 103, in which one finds the words "any annuity or annual payment mentioned . . . . in the next preceding clause,"

which again take one back to s. 102. The contention of the defendant is that this covenant to pay 62*l.* 10*s.* free of income tax is a covenant for the payment of an annual payment arising out of a contract without allowing the deduction of income tax within the meaning of s. 103, and the covenant is, therefore, "utterly void." It is said for the plaintiff that this is not really a covenant to pay 62*l.* 10*s.* free of income tax; it is really a covenant to pay 62*l.* 10*s.* plus such sum, representing the income tax, as, when deducted from the principal sum, would leave a clear 62*l.* 10*s.* for the particular quarter, and it is said that I ought to try and construe the covenant so as to make it legally possible. I am disposed, particularly in view of what I am going to say at a later stage, to give to the covenant, if possible, such a meaning as would give effect to the intention of the parties, but I find very great difficulty in saying that a contract to pay 62*l.* 10*s.* free of income tax means a contract to pay an entirely different sum which, after deducting the income tax, will leave 62*l.* 10*s.* I am inclined to agree with Mr. Latter that if the covenant had expressed the latter view, it would have been a valid covenant, but it is, in my opinion, impossible to extract that meaning from the language which the parties have used, and, therefore, unless the other point urged on behalf of the plaintiff is good, it appears to me that this contract does come within the exact words of s. 103, and that the covenant in the deed is void.

The other point is this. It is said that for the purpose of construing the covenant one must have regard to the order for permanent maintenance made by the Divorce Court and to the practice of that Court in accordance with which the order was made, and that by so doing one arrives at the conclusion that a deduction of income tax has in fact been made, not from the sum of 62*l.* 10*s.* but from some other sum, and that in these circumstances the covenant does not come within the protection in s. 103. In order to decide this point it becomes necessary to consider the authorities to which I have been referred. The question of the right to deduct income tax from permanent alimony was very carefully considered by Sir Herbert Jenner Fust in 1845 in *Frankfort* v. *Frankfort.* (1) In that case there had been a divorce and an order for the payment of 800*l.* a year as permanent alimony. The question then arose

(1) 4 Notes of Cases, 280.

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whether the sum was to be paid free of income tax. The Court laid down that, according to the then practice of the Court, in fixing the amount of permanent alimony the gross income of the husband was taken and the income tax which he would have to pay was deducted, and the net income thus arrived at was then divided between the husband and the wife in varying proportions according to the case, with the result that from each pound which was to go to the wife or was left to the husband there had been in fact a deduction for income tax, and Sir Herbert Jenner Fust pointed out (1) that the effect of the procedure of the Court at that time was that as income tax had already been deducted from the husband's income " it would be the height of injustice to call upon the wife to pay the tax on the sums she receives, for that would be making her pay it twice over." In 1895 the case of *Warren* v. *Warren* (2) came before Kekewich J. In that case an order had been made by the Divorce Court that the husband should pay to the wife an annuity of 700*l.*, and a deed was entered into whereby the payment of the 700*l.* was secured. There were no words either in the order or the deed saying that the annuity was to be paid free of income tax. Kekewich J. took the view that the annuity, being payable under a deed, was governed by the law relating to deeds and that from the payments made under the deed income tax could be deducted. The case of *Frankfort* v. *Frankfort* (3) does not appear to have been brought to the attention of the learned judge ; but in *In re Barry's Trusts* (4) the same question came again before him, and his attention was then called to *Frankfort* v. *Frankfort.* (3) In *In re Barry's Trusts* (4) there was no order of the Divorce Court. There was a voluntary deed of separation with a reference to a very distinguished King's counsel to determine the amount of the wife's alimony, and he named a figure. Nothing was said in the deed as to the alimony being " free of income tax," and the question came before the Chancery Division whether the deduction of income tax was or was not justified. Kekewich J said that the point was directly covered by his previous decision in *Warren* v. *Warren.* (2) He referred to the facts in *Frankfort* v. *Frankfort* (3) and said " if I had a case of that kind before me I

(1) 4 Notes of Cases, at p. 284.
(2) 72 L. T. 628 ; 43 W. R. 490.
(3) 4 Notes of Cases, 280.
(4) [1906] 1 Ch. 768.

should certainly follow it without hesitation." I do not follow how he could have had a case like that before him unless there was a deed, in which case the point which I am now considering would not arise. Then he says: "it may be that the rule is not applicable to a covenant—to an obligation by contract. It may be that an entirely different rule is applicable to a case where there is an order of the Court, which is made in invitum, and to a case where the obligation is contractual." He also said—which, of course, was of great importance in that case—that there was no evidence as to how the arbitrator had arrived at the figure, and it appears that the Registrar of the Probate Division had told the learned judge that there was no settled practice on this point, so that he was not able, from the materials before him, to know whether or not income tax had or had not been taken into account. He therefore dealt with the matter, as he had done in *Warren* v. *Warren* (1), as being a question of debt which was governed by the provisions of the Income Tax Act, 1842, relating to covenants in deeds. The case went to the Court of Appeal (2), and the Court treated the matter as too clear for argument. Vaughan Williams L.J. said that the practice of the Court as to alimony did not touch the case in the slightest degree, but, as Kekewich J. in the Court below had said there was no practice, I do not quite understand what that means. The Court of Appeal seemed to have thought that Kekewich J. was right in dealing with the matter on the basis that a deed, although it arose out of matters in the Divorce Court, was governed by the ordinary law as to deeds and by the provisions of the Income Tax Act, 1842, as to deeds.

Lastly I was referred to *Shrewsbury* v. *Shrewsbury* (3), which was not a case arising out of proceedings in the Divorce Court, but a case where a voluntary deed of separation had been entered into, by which the husband undertook to pay to the wife an annual allowance "clear of all deductions." Kennedy J., having read the judgments in *In re Barry's Trusts* (2), *Frankfort* v. *Frankfort* (4), and *Warren* v. *Warren* (1), felt himself bound by those decisions and concurred with them, and treated them as making it clear that there was an obligation to deduct the tax in such a case as that. He said

(1) 72 L. T. 628; 43 W. R. 490.
(2) [1906] 2 Ch. 358.
(3) 22 Times L. R. 598.
(4) 4 Notes of Cases, 280.

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the contract "fell within ss. 102 and 103. He was not satisfied that the contract would have been void under s. 103 if in some way the plaintiff had come into possession of 4000*l.* a year after complying with s. 102." I think by that he must have meant if the covenant was such that the plaintiff got 4000*l.* a year after some one else had complied with s. 102.

I think that the result of these decisions is that when there is a covenant in a deed for the payment of maintenance it must be construed as a deed which is subject to the provisions of the Income Tax Acts as to deeds, without regard to the practice of the Divorce Court, and the authorities appear to justify me in holding—and I think I am bound by the decision of the Court of Appeal in *In re Barry's Trusts* (1) to hold—that if this deed is one which provides for the payment of the instalments in full without allowing the deduction of income tax—and in my opinion it is such a deed—it comes within the prohibition of s. 103 of the Income Tax Act, 1842.

An order of the Divorce Court does not seem to me, as at present advised, to come within that section, and I think it is quite possible, if proceedings are taken for the enforcement of the order before the learned President of the Divorce Division, that the defendant, who is able to rely in this action on the provisions of s. 103 as justifying the deduction of income tax in spite of the language of the covenant, may not be able to rely on that section as an answer to an application for the enforcement of the order. It is I think to be regretted that one may have an action in one Division of this Court and a proceeding in another Division on substantially the same question which may have a different result; but I think the fault does not lie with the Courts, but with the advisers of the parties who were not satisfied with the remedies they might have for the enforcement of the order of the Divorce Court.

The result is that I hold that in this action, based on the covenant, the plaintiff is not entitled to rely on the provision in the deed, and the defendant is entitled to deduct the quarter's income tax which he has deducted.

The defendant in fact had deducted a year's income tax, but he does not now contend that he is entitled to deduct more than a year's income tax for one quarter, and he has paid into Court three-

(1) [1906] 2 Ch. 358.

quarters of the amount claimed with a denial of liability; strictly speaking, the plaintiff would be entitled to be paid the costs up to the time of payment in, and the defendant would have the costs subsequently incurred; but I do not like these complicated taxations, and, particularly in view of the prospect, which I think very likely, that these proceedings may turn out to be quite futile, in giving judgment for the defendant, as he has paid enough into Court and the plaintiff fails as to the remaining 4*l.* 5*s.* 2*d.*, I do so without costs.

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Judgment for defendant.

Solicitors for plaintiff: *Lewis & Lewis.*

Solicitors for defendant: *Henry Mossop & Syms.*

F. O. R.

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Dec. 7.

Insurance (National) — Employed Contributor — Whether Outworker employed otherwise than by Way of Manual Labour—Summons against Employer for Non-payment of Contribution—Jurisdiction of Justices where no Determination by Insurance Commissioners—National Insurance Act, 1911 (1 *& 2 Geo.* 5, *c.* 55), *ss.* 66, 69; *Sched. I., Part I.* (*c*), *Part II.* (*g*).

On a prosecution under s. 69 of the National Insurance Act, 1911, of an employer for failure to pay any contribution in respect of a person alleged to be an employed contributor, the jurisdiction of justices to decide whether the employment of that person is employment within the meaning of Part I. of the Act is not ousted by the fact that there has been no determination of that question by the Insurance Commissioners under s. 66, sub-s. 1, of the Act.

Don Brothers, Buist & Co. v. *Scottish Insurance Commissioners*, 1913 S. C. 607, distinguished.

RULE NISI calling upon H. W. W. Wilberforce, Esq., one of the metropolitan police magistrates, and Robert Glanfield and Charles Glanfield to show cause why the magistrate should not proceed to hear and determine an information preferred on behalf of the Insurance Commissioners against the said Robert Glanfield and Charles Glanfield for having on May 23, 1914, failed to pay a contribution for the week commencing May 18, 1914, under the National Insurance Act, 1911, in respect of an employed contributor, namely,

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Solomon Rosenthal, contrary to Part I. of the National Insurance Act, 1911, and the regulations made thereunder.

Rosenthal, who was an outworker to whom Messrs. Glanfield gave out materials for tailoring work, employed a number of hands in connection with this work. The Insurance Commissioners contended that Rosenthal was an employed contributor in respect of whom Messrs. Glanfield were bound to pay contributions under the National Insurance Act and took out a summons against them for not having paid the same. It appeared that Rosenthal received remuneration at a rate exceeding 160*l.* a year, but a question was raised as to whether he was employed "otherwise than by way of manual labour" within Sched. I., Part II. (*g*), of the Act. The magistrate, on the summons coming before him, took the view that by virtue of s. 66 of the National Insurance Act, 1911 (1), the question whether the employment of Rosenthal was employment

(1) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 66, sub-s. 1: "If any question arises—

"(*a*) as to whether any employment or any class of employment is or will be employment within the meaning of this Part of this Act or as to whether a person is entitled to become a voluntary contributor; or

"(*b*) as to the rate of contributions payable by or in respect of any insured person; or

"(*c*) as to the rates of contributions payable in respect of an employed contributor by the employer and the contributor respectively;

the question shall be determined by the Insurance Commissioners, in accordance with regulations made by them for the purpose: Provided that—

"(i.) if any person feels aggrieved by the decision of the Insurance Commissioners on any question arising under paragraph (*a*), he may appeal therefrom to the county court, with a further right of appeal upon any question of law to such judge of the High Court as may be selected for the purpose by the Lord Chancellor, and the decision of the judge shall be final;

"(ii.) the regulations of the Insurance Commissioners may provide for questions under paragraph (*b*) being determined, in the case of any person who is or is about to become a member of an approved society, by the society;

"(iii.) the Insurance Commissioners may, if they think fit, instead of themselves deciding whether any class of employment is or will be employment within the meaning of this Part of this Act, submit the ques-

within the meaning of Part I. of the Act could only be determined by the Insurance Commissioners, and as they had not determined that question he had no jurisdiction to adjudicate upon it. This rule was thereupon obtained.

Sir George Cave, S.-G., and *G. A. H. Branson*, for the magistrate, showed cause. The intention of the Legislature in s. 66, sub-s. 1, obviously was to provide against the possibility of different magistrates giving different decisions as to what employments or classes of employment are within the Act by enacting that such questions shall be decided by one body, namely, the Commissioners. It is true that the Commissioners have not as yet made any regulations in reference to this matter, but they cannot exclude their jurisdiction by the omission to frame regulations. In *Don Brothers, Buist & Co.* v. *Scottish Insurance Commissioners* (1) the Court of Session held that it had no jurisdiction to interfere with the determination of the Commissioners under s. 66, sub-s. 1, paragraph (*c*), as to the rates of contributions payable in respect of an insured contributor.

[He was stopped.]

Sir F. E. Smith, A.-G. (*A. S. Comyns Carr* with him), for the Insurance Commissioners in support of the rule. Sect. 66 was not intended to oust the magistrate's jurisdiction under s. 69, sub-s. 2, of the Act (2); its object was merely to provide a convenient method

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tion for decision to the High Court in such summary manner as subject to rules of Court may be directed by the Court, and the Court, after hearing such parties and taking such evidence (if any) as it thinks just, shall decide the question, and the decision of the Court shall be final."

(1) 1913 S. C. 607.

(2) Sect. 69, sub-s. 2: "If any employer has failed to pay any contributions which under this Part of this Act he is liable to pay in respect of an employed contributor, or if any such employer, any insured person, or any other person is guilty of any other contravention of or non-compliance with any of the requirements of this Part of this Act or the regulations made thereunder in respect of which no special penalty is provided, he shall for each offence be liable on summary conviction to a fine not exceeding ten pounds, and where the offence is failure or neglect on the part of the employer to make any such contributions, to pay to the Insurance Commissioners a sum equal to the amount of the contributions which he has so failed or neglected to pay, which

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by which the Commissioners might deal with broad classes of cases when asked to do so on the voluntary application of the parties. It does not provide a tribunal for testing the merits of individual cases. No means are provided by which parties can be compelled to appear before the Commissioners, and till the National Insurance Act, 1913, they had no power to administer an oath. The Act of 1913 did not, however, confer upon them the power to require the attendance of the parties. In a case proper for a fine they cannot impose it although the issue before them may be precisely the same as that which may come before a magistrate. Further, the Commissioners are empowered by s. 66, sub-s. 1, to make regulations providing for questions under paragraph (*b*), that is, as to the rate of contributions payable by or in respect of any insured person, being determined by the approved society of which the person is a member. If the Commissioners so provide, it cannot be supposed that the decision of the society excludes the jurisdiction of the magistrate. The matter, however, is put beyond doubt when regard is had to the proviso to s. 69, sub-s. 2, which would have been altogether unnecessary if the magistrate's view of the scope of s. 66, sub-s. 1, is correct. By that proviso a defendant is not liable to a penalty if, when he is brought before the magistrate, he can establish two things, first, that he has obtained a decision of the Commissioners in his favour, and, secondly, that he has acted in conformity therewith. The proviso does not enact that if the determination of the Commissioners is in favour of the prosecutor, that determination shall be binding; therefore, even if the prosecutor obtained a decision of the Commissioners in his favour, he would still, if he asked the magistrate to impose a penalty, have to prove before him what he had already proved before the Commissioners. Sect. 106, which is in Part II. of the Act and relates only to unemployment insurance, shows that when the Legislature intended to postpone the magistrate's jurisdiction till a decision has been given by some other person it

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sum when paid shall be treated as a payment in satisfaction of such contributions:

"Provided that no person shall be liable to any penalty in respect of any matter if he has acted in conformity with any decision in respect thereto by the Insurance Commissioners, or, if the matter is one which the insurance committee is competent to decide, in conformity with its decision."

has expressly so enacted: see sub-s. 6. No similar enactment is contained in Part I. of the Act.

Roome, for Messrs. Glanfield, adopted the argument of the Attorney-General.

Sir George Cave, S.-G., in reply. Sect. 66, sub-s. 1, does much more than make the Commissioners a consultative body; it says that the questions mentioned in paragraphs (*a*), (*b*), and (*c*) "shall be determined by the Insurance Commissioners," and if the parties do not, as they may, appeal from that determination they are concluded thereby. An analogous jurisdiction to this is possessed by the Board of Education under the Education Acts, although, as was pointed out by Lord Loreburn L.C. in *Board of Education* v. *Rice* (1), the Board has no power to administer an oath. As to the proviso to s. 69, sub-s. 2, upon which reliance has been placed, it must be observed that it applies to the whole of sub-s. 2 and deals with matters as to which s. 66 has no application.

RIDLEY J., after stating the nature of the rule and the terms of ss. 66 and 69 of the National Insurance Act, 1911, continued as follows: By virtue of s. 69, the general duty of enforcing the Act is cast upon the magistrate. It is said that matters dealt with by s. 66 are removed from his jurisdiction and placed under the control of the Insurance Commissioners. But I think the better view is that that section, without interfering with the magistrate, merely enables a person concerned to go before the Commissioners on any question arising and obtain their decision as to whether he is an employed contributor or not. This view is borne out by the proviso to s. 69, sub-s. 2, that "no person shall be liable to any penalty in respect of any matter if he has acted in conformity with any decision in respect thereto by the Insurance Commissioners." That proviso affords protection to the person who appears before the magistrate in respect of such a question if he has acted in conformity with the Commissioners' decision. Perhaps on some future occasion the question may arise whether the magistrate has power to rehear in some respects and to express disagreement from the Commissioners' decision where it is not in favour of the defendant, but it is not necessary to decide that point in the present case.

(1) [1911] A. C. 179, at p. 182.

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Ridley J.

The Scottish case of *Don Brothers, Buist & Co.* v. *Scottish Insurance Commissioners* (1) was not, in my opinion, dealing with the same point as that with which we are concerned. There a magistrate's decision was not in question; it was an action brought to set aside the determination of the Commissioners, and it was held that under paragraph (*c*) of s. 66, sub-s. 1, their decision was final. Further, there appears to be no right of appeal under paragraph (*c*), whereas there is under paragraph (*a*), which is the one now in question. For the reasons I have given I think this rule must be made absolute.

LUSH J. I agree, although I confess that the case is not free from difficulty. At first sight it would appear that s. 66, sub-s. 1, was intended to confer upon the Commissioners an exclusive jurisdiction to determine whether an employment or class of employment is employment within Part I. of the Act, and if this were so it would give the Commissioners an exclusive jurisdiction whether the proceedings were for a penalty before a magistrate or whether they took the form of an action in the High Court. But in view of the language of the proviso to s. 69, sub-s. 2, it is very difficult for us to hold that the magistrate's jurisdiction was intended to be ousted. That proviso almost of necessity indicates that although the Commissioners may have given a decision, as for example on the question whether the relation of the two persons was that of employer and employed, that decision was not to be binding on the magistrate, because otherwise it is impossible to explain how it is that the magistrate should treat as an excuse from the imposition of a penalty the fact that the Commissioners have decided in favour of the view of the defendant. If it was intended that that decision should be final, there could be no question of the magistrate giving effect, for the purpose of excusing from penalties, to the fact that the Commissioners had adjudicated favourably to the person who is summoned before him. I think that this proviso, which applies to any matters coming within Part I. of the Act, shows that although the Commissioners have what I may call a provisional jurisdiction under s. 66, sub-s. 1, to decide whether the relation of employer and employed exists, it is not a final decision which ousts the magistrate's

(1) 1913 S. C. 607.

jurisdiction. Here there has been no decision by the Commissioners. It is not perhaps necessary to say whether, if it had been given, the magistrate might not still express his own opinion as to whether the relation of employer and employed exists, but I am satisfied that in a case like this the magistrate has jurisdiction under s. 69 to express his own opinion as to whether that relation exists, and if he thinks it does he can deal with the matter as contemplated by the Act.

The Scottish case, when examined, is not really an authority in support of the Solicitor-General's argument. That was an action brought against an employee and the Insurance Commissioners. The Commissioners pleaded that they had bona fide decided the question sought to be determined in the action. The action was brought to obtain a reduction of their award as to the rates of contributions under s. 66, sub-s. 1, paragraph (*c*), and the Court of Session held that under that paragraph an exclusive jurisdiction had been given to the Commissioners which ousted the jurisdiction of the Court. The judgment of Lord Johnston makes it clear that the Court dealt with the case exclusively on the ground that the question arose under paragraph (*c*) and not under paragraph (*a*). The case is not an authority with regard to any application under paragraph (*a*). For these reasons I think the magistrate took an erroneous view as to his jurisdiction, and therefore that the rule should be made absolute.

Low J. I agree that the matter is one of some difficulty, but as the judgments which have already been delivered exactly state my view, it is unnecessary for me to add anything.

Rule absolute.

Solicitor for magistrate: *Treasury Solicitor.*

Solicitor for Insurance Commissioners: *Solicitor to Insurance Commissioners.*

Solicitors for Messrs. Glanfield: *Culross & Holt.*

J. S. H.

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June 4, 8.

[IN THE COURT OF APPEAL.]

THE KING *v.* FOOT'S CRAY URBAN DISTRICT COUNCIL.

Local Government—Buildings—By-Laws—Infringement—Part of Old Building pulled down and New Part erected—"New building"—Plans of whole Building—Public Health Acts Amendment Act, 1907 (7 *Edw.* 7, *c.* 53), s. 23.

Sect. 23 of the Public Health Acts Amendment Act, 1907, provides as follows: "For the purposes of this Act and the Public Health Acts and any by-laws made thereunder, each of the following operations, namely: (*a*) the re-erection, wholly or partially, of any building of which an outer wall is pulled down or burnt down to or within ten feet of the surface of the ground adjoining the lowest storey of the building . . . . shall be deemed to be the erection of a new building."

A local authority's by-law provided that "Every person who shall intend to erect a building shall give to the council notice in writing of such intention . . . . and shall at the same time deliver or send . . . . complete plans and sections of every floor of such intended building . . . ."

The appellants, the owners of an old building, pulled down part of it, including certain outer walls, leaving the remaining part of the premises standing. The old part of the premises was erected before building by-laws came into existence. The appellants gave notice in writing to the local authority of their intention to erect on the site of the part pulled down a new part, and with that notice they sent plans and sections of the new part, but they gave no notice as to, or plans or sections of, the whole building, that is, the part left standing and the new part:—

Held, that under s. 23 of the Public Health Acts Amendment Act, 1907, the whole building, that is, the old part and the new part, was not to be deemed to be a new building, and therefore the appellants were not bound to send notices as to, and plans and sections of, the whole building to the local authority.

Leonard v. *Hoare & Co.* [1914] 2 K. B. 798 overruled.

Appeal from the decision of a Divisional Court (Ridley, Avory, and Lush JJ.) discharging an order nisi calling upon the respondents, the Foot's Cray Urban District Council, to show cause why a writ of mandamus should not issue commanding them to hear and determine an application by Hoare & Co., Limited, that the council should approve certain plans and notices submitted to them for the re-erection of a certain public-house and premises known as the Seven

Stars in Foot's Cray, Kent, on the ground that such plans and notices duly complied with the by-laws of the district council, and on the further ground that it was unnecessary that the portion of the old building left standing (which was erected before any building by-laws were in force in the said district) should comply with the existing by-laws, and further that the existing by-laws, if so framed as to include the said old building, were unreasonable and ultra vires.

The appellants, Messrs. Hoare & Co., Limited, a firm of brewers, were the owners of a public-house called the Seven Stars at Foot's Cray in Kent. The Seven Stars was a very old building, said to be upwards of two centuries old, and the appellants, being desirous of building an addition to the premises, pulled down a portion of the outer wall to the level of the ground, and also pulled down a portion of the old premises, leaving the remaining (and larger) part of the premises standing.

Notice in writing of the appellants' intention to erect the new part of the building, accompanied by plans, was given to the respondents, but no notice as to, or plans and sections of, the whole building, including the part left standing, were given to them.

The respondents disapproved the plans, but assigned no reason for their disapproval. The appellants were ultimately summoned by the respondents for having failed to comply with the provisions of by-law No. 104 made by the respondents, in that, intending to erect a building in the district, they failed to deliver or send to the council notice in writing of such intention and failed to deliver or send complete plans and sections of every floor of such intended building. The by-law was in these terms: "Every person who shall intend to erect a building shall give to the council notice in writing of such intention . . . . and shall at the same time deliver or send, or cause to be delivered or sent, ... complete plans and sections of every floor of such intended building . . . . and shall show the position, form, and dimensions of the several parts of such building."

By order of the Local Government Board s. 23 of the Public Health Acts Amendment Act, 1907 (1), was in force in the district.

(1) The Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 23: "For the purposes of this Act and the Public Health Acts and any by-laws made thereunder, each of the following operations, namely:—

"(*a*) The re-erection, wholly or

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The respondents admitted that, if the portion of the old building left standing was not, and should not be treated as part of, a new building, by-law 104 had been complied with by the appellants. The appellants admitted that if that portion should be treated as part of a new building the by-law had not been complied with

On behalf of the respondents it was contended that under by-law 104 notice as to, and plans and sections of the whole building, i.e., the part left standing and the part to be newly erected, and not merely as to and of the part to be newly erected, were required to be given to the council, inasmuch as the whole constituted a new building, or was, under s 23 of the Public Health Acts Amendment Act, 1907, to be deemed the erection of a new building.

On behalf of the appellants it was contended that under by-law 104 notice as to, and plans and sections of, the building to be newly erected were to be given, and not plans and sections of the old building to be left standing, and that the only re-erection contemplated or intended by them was of the portion pulled down.

The justices were of opinion that the re-erection of the building on the portion pulled down constituted a partial re-erection of a building within s. 23 of the Act of 1907, that such partial re-erection only should be deemed to be the re-erection of a new building, and that such partial re-erection was the only new building intended to be erected by the appellants. They therefore found that by-law 104 had been sufficiently complied with and dismissed the information, but stated a special case for the consideration of the Divisional Court.

Upon the hearing of the special case the Divisional Court held that under s. 23 of the Public Health Acts Amendment Act, 1907, the whole building, that is, the old part and the new part, was to be deemed to be a new building, and therefore the appellants were

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partially, of any building of which an outer wall is pulled down or burnt down to or within ten feet of the surface of the ground adjoining the lowest storey of the building . . . .

"(*d*) The making of any addition to an existing building by raising any part of the roof, by altering a wall, or making any projection from the building, but so far as regards the addition only;

. . . . shall be deemed to be the erection of a new building."

bound to send notice as to, and plans and sections of, the whole building to the local authority. They accordingly remitted the case to the justices with a direction to convict: see *Leonard* v. *Hoare & Co.* (1) The justices accordingly convicted the appellants.

Fresh plans were then prepared by the appellants' surveyors and were sent in to the respondents. These plans were as regards the part actually re-erected facsimiles of those previously delivered, except for the correction of a slight and immaterial error. As regards that part of the building which was not re-erected the plan sent in showed all the floors, the plan originally sent in having shown merely the ground floor.

These plans were disapproved by the respondent council on the ground that they did not comply with the by-law.

On June 8, 1914, the appellants were served with a notice of the intention of the respondents to take proceedings in a Court of summary jurisdiction to recover penalties on the ground that the appellants had brought forward part of the front of the building, that is, of the old building, beyond the main walls on either side thereof. The appellants thereupon applied for a writ of mandamus to compel the respondents to consider and approve their plans, and on July 2, 1914, obtained an order nisi to that effect, which was discharged on November 19, 1914, the Divisional Court considering itself bound by the decision in *Leonard* v. *Hoare & Co.* (1)

Messrs. Hoare & Co now appealed from the decision of the Divisional Court.

P. Ogden Lawrence, K.C., and *A. H. Poyser*, for the appellants. Sect. 23 of the Act of 1907 cannot have the construction sought to be put upon it by the respondents, for if it has it involves this, that as soon as a portion of an outer wall of an Elizabethan house is pulled down and a new part is intended to be erected a notice and plans and sections of the whole building complying in all respects with modern by-laws will have to be sent in to, and be approved by, the local authority. This is an impossible contention. The object of notices and plans is to enable the local authority to insist upon the building by-laws being complied with so far as regards the building which is to be erected. The re-erection, wholly or partially,

(1) [1914] 2 K. B. 798.

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of a building within s. 23 (*a*) does not mean the re-erection of the whole building, but means the re-erection upon the area on which stood the part pulled down; it is the re-erection which is to be the new building. It is an undue straining of language to say that plans must be sent in of the old part of the building which the appellants do not propose to touch. [They cited *Rex* v. *Preston Rural District Council*. (1)]

Morten, K.C., and *Jeeves*, for the respondents. The whole of the building, that is, the old part together with the new part erected on the site of the part pulled down, constitutes a new building within the meaning of the section. This is the first attempt that has been made to divide a building into an old building and a new building. Sect. 159 of the Public Health Act, 1875, is the foundation of the legislation on the subject, and it is impossible to contend that under that section there can be a building partly old and partly new. Sect. 23 of the Act of 1907 is merely an extension of s. 159 of the Act of 1875, which makes no difference between the old part and the new part of a building. If a new building is simply to be tacked on to an old one, the fitness of the new building is seriously impaired by the unfitness of the old one. The necessary effect of accepting the appellants' argument is that the by-law with regard to a wall being pulled down to within ten feet of the ground only applies to the new part of the wall superimposed on the old part, and the by-law will have no application to the part of the wall that remains. [They cited *Hanrahan* v. *Leigh-on-Sea Urban Council*. (2)]

Lawrence, K.C., was not called upon to reply.

June 8. SWINFEN EADY L.J. This is an appeal from the judgment of the Divisional Court discharging a rule nisi for a mandamus. The Divisional Court conceived themselves bound, as they were bound, by the previous decision of the Divisional Court in *Leonard* v. *Hoare & Co.* (3) In giving judgment Lush J. said: "Speaking for myself, I am very strongly impressed by the contention of Mr. Poyser"—he appears for the appellants in the present case—"and if this question had been one which I felt justified in applying my own judgment to I should have hesitated before I agreed in the

(1) (1911) 76 J. P. 65. (2) [1909] 2 K. B. 257.
(3) [1914] 2 K. B. 798.

judgment of the Court." Then he gives his reasons, but as a member of the Divisional Court he was bound by the Court's previous decision, and so the rule was discharged, and it is from the discharge of that rule that the present appeal is brought.

The appellants, Messrs. Hoare & Co., Limited, were possessed of an ancient messuage at Foot's Cray, called the Seven Stars public-house. They were minded to improve it by pulling down a certain portion of it. Upon the site of the part that was entirely pulled down—it was pulled down to the ground—and upon a certain adjoining site they were minded to erect an improvement and an addition to their ancient messuage. In part it was an extension of it and in part it was a re-erection upon substantially the old site, and they submitted plans to the local authority of their intended new building, that is to say, of the part which they intended to re-erect—of the new portion. The local authority raised the question that such a re-erection constituted the whole building, the old part as well as the new, a new building in respect of which plans must be submitted, and as to which all the by-laws must be complied with, and they took proceedings before the magistrates. The magistrates took the view that Messrs. Hoare & Co. were right, and that the plans submitted were proper as referring only to the new buildings, but a case was stated, and the Divisional Court held the contrary, and held that the whole building, the old part as well as the new part, had become a new building under s. 23 of the Public Health Acts Amendment Act, 1907, and remitted the matter to the magistrates to convict. It is conceded that the plans refer to the new part, and the new part itself has been erected in accordance with the by-laws, but objection is taken by the local authority although in fact it has been completed—it has been allowed apparently by arrangement between the parties to be completed—still the objection is raised, and Messrs. Hoare & Co. have received formal notice of an offence. The clerk to the local authority on June 8 served them with a formal notice of offence in bringing forward their building contrary to the Public Health Act, that is to say, this notice relates to the old portion of the building which has remained standing and has not been interfered with. It is the old portion that no doubt projects into the street, and does so now in the same manner as it had done for centuries previously. The notice runs thus: "We, the urban

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district council for the urban district of Foot's Cray, hereby give you notice that you have committed an offence in erecting and bringing forward a certain building known as the Seven Stars, High Street, Foot's Cray, within our said district beyond the front main wall of the building on either side thereof in the same street without having obtained our written consent and that for such offence you are liable to a penalty not exceeding forty shillings for every day during which the offence is continued after this notice to you." That being the position, after conviction by the magistrates further plans were submitted by Messrs. Hoare & Co. to the local authority, which plans show the old building exactly as it stands and the new building as it was originally intended to be constructed, and as it has now been constructed and finished. They say that if under the decision of the magistrates their plans are bound to extend to the old part as well as to the new part they can only comply with the requirement by giving plans showing accurately the existing old part and also showing accurately the new part as now erected, and those plans have been submitted. The local authority have refused to approve those on the ground of the decision of the Divisional Court, and this application for a mandamus which has been discharged by the Divisional Court is really brought to review the previous decision of the Divisional Court in *Leonard* v. *Hoare & Co.* (1), and whether that decision was right or wrong depends upon the true construction of s. 23 of the Public Health Acts Amendment Act, 1907. It is necessary to consider for a moment what was the position before that statute was passed. Under the Public Health Act, 1875, the local authority have power to make by-laws respecting new buildings. That is the power contained in s. 157 of the Public Health Act, 1875, and the effect of the proviso in that section is to exempt old existing buildings from the operation of the by-laws, and it is to preserve the old buildings. Then s. 159 provides: "For the purposes of this Act the re-erecting of any building pulled down to or below the ground floor or of any frame building of which only the framework is left down to the ground floor" —and other things—"shall be considered the erection of a new building." Questions arose with regard to that as to what amounted to the re-erecting of any building pulled down and

(1) [1914] 2 K. B. 798.

when was the building a new building within the meaning of that section, and the authorities have decided that whether the building was a new building or not was a question of fact in each case. Lord Coleridge C.J. in *James* v. *Wyvill* (1) said: "The question whether a building is a new building or not has been decided over and over again to be a question of fact; it is a question of degree. For instance, if a building were nearly all taken away and then rebuilt, it clearly would be a new building; on the other hand, it is quite clear that by a small addition of, say, a door, the building would not thereby become a new building. Between these two extreme cases there may be thousands of cases, and it would be impossible to give a definition in each particular case as to what is or is not a new building; and it must be left to the discretion of each judge to decide for himself what is a new building." That is to say, upon the whole facts of the case it must be determined, Aye or No, is the building a new building or not? The inconvenience of leaving the matter in that way in doubt was, as regards London, settled by the provisions of the London Building Act, 1894, and that defines what a new building is. It says in s. 5, sub-s. 6, that "the expression 'new building' means and includes any building erected after the commencement of this Act. Any building which has been taken down for more than half of its cubical extent and re-erected or commenced to be re-erected wholly or partially on the same site after the commencement of this Act." There there is a clear definition that if it is taken down for more than half of its cubical extent it is a new building, if not, it is not a new building. That applies to London and does not apply otherwise; it is an Act local in its application.

In that state of things was passed the Public Health Acts Amendment Act, 1907, and s. 23 is the material section of that Act: "For the purposes of this Act and the Public Health Acts, and any by-laws made thereunder, each of the following operations, namely, (*a*) The re-erection, wholly or partially, of any building of which an outer wall is pulled down or burnt down to or within ten feet of the surface of the ground adjoining the lowest storey of the building, and of any frame building so far pulled down or burnt down as to leave only the framework of the lowest storey"—and then there are other

(1) (1884) 51 L. T. 237.

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things—"shall be deemed to be the erection of a new building." Omitting immaterial words, the section therefore reads in this way: the following operation, namely, the re-erection wholly or partially of any building of which the outer wall is pulled down, shall be deemed to be the erection of a new building. It will be observed there that the new building is described by reference to the operation, the building operation; it is the operation and the execution of the following work, the re-erection wholly or partially shall be deemed to be the erection of a new building and the work being executed is the erection of a new building. That language limits the new building to the operation of the work, and it appears to me that the true construction of that section is that which is there referred to, the erection of a new building, the work that is being carried out. There is no definition of what is a new building, and there is no reference to any determination of what a new building is, except with regard to work being done, and it is the work being done which is deemed to be the erection of a new building. In my judgment such language necessarily leads to the conclusion that a new building within the meaning of the section is the work which is the subject of that operation. It is said it does not mean that, but that if an outer wall is pulled down to the ground and is re-erected, then it is the whole or partial re-erecting of a new building, and that the new building is the entirety, the old part as well as the new. In my opinion that is not the true construction of the section. The argument amounted to this: that if the outer wall, or one of the outer walls, of an ancient house was pulled down or burnt down, then that cannot be reinstated without its being held that the persons doing the work are erecting a new building within the meaning of the section, so as to bring the whole of the by-law of the local authority into operation with regard to the old building as well as the new. When one considers the numerous matters to which the by-laws refer, it is manifest that they are practically inapplicable to an old building in many cases, and would involve, and in some cases must involve, what is practically the entire pulling down of the old building merely because an outer wall has to be reinstated. It is said in the present case that, if the by-laws of the local authority are to be applied to the old building, the plans would fail to show compliance with those by-laws in numerous respects with reference

to the construction of the walls, with reference to the footings, roof, timbers, floor-joists and boards, damp course, insufficient air space, both in front and in rear, the height of the rooms, the site on which the building is erected not being covered with concrete, and in fact numerous details in which an old house might be expected not to comply with the by-laws. In my opinion the true construction of s. 23 is that which I have stated, and in my judgment the decision of the Divisional Court in *Leonard* v. *Hoare & Co.* (1) was erroneous.

The facts of the present case and the concessions made by counsel show that s. 159 of the Public Health Act, 1875, has no application to the present case. It solely rests upon s. 23 of the Act of 1907.

Then it was urged by Mr. Jeeves that any such decision on s. 23 would be inconsistent with the previous decision of the Court of Appeal in *Hanrahan* v. *Leigh-on-Sea Urban District Council.* (2) In my opinion there is no foundation for that contention. That was a proceeding under s. 159, but under a portion of the section to which I have not yet referred. Sect. 159 of the Public Health Act, 1875, provides that the conversion into a dwelling-house of any building not originally constructed for human habitation shall be considered the erection of a new building. What had been done in *Hanrahan* v. *Leigh-on-Sea Urban District Council* (2) was to convert a railway carriage, which obviously was not constructed for human habitation, into a dwelling-house. Lord Alverstone C.J., at p. 263, said: "The enactment provides that the conversion of an old structure into a dwelling-house shall for the purposes of the by-laws be considered to be the erection of a new building." It obviously had been converted into a dwelling-house, and therefore it was clearly, within the words of the section, the erection of a new building. The contest there was, that being so, to what extent did the powers of the local authority extend? That was the whole point, and not whether there was the erection of a new building. In my opinion the conclusion at which I have now arrived is quite consistent with the judgment in that case, and under the circumstances I am of opinion that Messrs. Hoare & Co., the appellants, have now done all that is necessary for them to do after having been convicted by the magistrates. Under their decision they had to supply plans of the old as well as the new, but the only proper plans they could supply

(1) [1914] 2 K. B. 798. (2) [1909] 2 K. B. 257.

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were plans with regard to the new as now erected and with regard to the old as it stood. Under those circumstances it does not lie on the local authority to object that such plans ought not to have been submitted to them at all, because they have required plans of the whole to be submitted to them, and Messrs. Hoare & Co. have been convicted because they did not supply plans of the whole, and such plans have now been supplied. Under those circumstances I am of opinion that such plans are a compliance with the by-laws, and the rule for a mandamus should be made absolute and not discharged.

PHILLIMORE L.J. On July 2, 1914, Mr. Poyser obtained an order nisi directing the urban district council of Foot's Cray to "show cause why a writ of mandamus should not issue directed to them commanding them to hear and determine pursuant to the statutes in that behalf the matter of an application by the said Hoare & Co. Limited that the said council should approve and signify in writing their approval of certain plans and notices submitted to them and to their clerk and surveyor by the said Hoare & Co. Limited in respect of the re-erection of a portion of a certain public-house and premises known as the 'Seven Stars' situate at Foot's Cray aforesaid within the district and that it may be ordered that a writ of mandamus do issue directed to the above-named urban district council of Foot's Cray commanding them to hear and determine pursuant to the statutes in that behalf the matter of an application by the said Hoare & Co. Limited that the said council should approve and signify in writing their approval of certain plans and notices submitted to them and to their clerk and surveyor by the said Hoare & Co. Limited in respect of the re-erection of a portion of a certain public-house and premises known as the 'Seven Stars' situate at Foot's Cray aforesaid within the district of the council on the ground that the said plans and notices duly complied with the by-laws of the said district council and on the further ground that it was unnecessary that the portion of the old building left standing (which was erected before any building by-laws were in force in the said district) should comply with the existing by-laws and further that the existing by-laws, if so framed as to include the said old buildings, are unreasonable and ultra vires." On the argument the Court discharged that order nisi, and the appeal is from the refusal of the

Court to make the order absolute. I agree with Swinfen Eady L.J. that the order should be made absolute.

The Divisional Court, not improperly or unnaturally, followed the decision of another Divisional Court from which there could be no appeal, which had convicted Messrs. Hoare & Co., Limited, for building, or starting to build, their new works without getting their plans passed by the district council, and the principle upon which that conviction was based was the principle which, if sound, would necessitate the discharge of this order. Therefore, in substance, this is an appeal in a way in which such an appeal can be presented against the decision of the Divisional Court on the special case. I agree that the decision of that Court was wrong, and that the principle upon which it proceeded should be disallowed.

Now probably ever since local authorities have been entitled to frame building by-laws for new buildings the question has arisen whether or not the re-erection of part of an old building was sufficiently large to amount to the erection of a new building, or whether it should be considered only as the repair of the old building or a reinstatement of a portion of the old building which had fallen down, or been burnt down or pulled down. Certain cases arose on this before the passing of the Public Health Act, 1875. Sect. 159 of that Act is not exhaustive, but it mentions certain canons which will decide, where they are applicable, that the re-erecting of a building is to be deemed the erection of a new building. Still, it leaves questions of fact to be determined probably in many cases under that section. The short cut of the London Building Act, 1894, does not apply outside London, and it is not contended here that this new work was of sufficient extent to make the whole into a new building either at common law or under the general language of the statutes or under the special provisions of s. 159. What is relied upon is s. 23 of the Act of 1907. Now, that is an adopting Act and a cumulative Act; it adds, it does not repeal; it does not substitute, at any rate in the parts which we are dealing with, other provisions for those of the general Act of 1875. It adds, in my view, certain additional provisions and gives certain additional powers to local authorities where the Act is adopted, outside and beyond those conferred by the Act of 1875, and one can at once see that a very useful provision may be found in this connection without its going to

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Phillimore L.J.

the length for which the district council contends. If the re-erection is large enough to make the whole a new building, it has to comply with the by-laws, but if it is not large enough to make the whole a new building, the place re-erected need not comply with the by-laws; the provisions of the Public Health Act, 1875, do not apply. It would be a very useful provision if Parliament were to provide that new pieces of old buildings, though they should not drag with them all the rest of the old building, should in themselves comply with the ordinary by-laws and rules about new buildings. If the language of the Act is carefully read that seems almost to be certain by what it means. Each of the following operations, to wit, the re-erection wholly or partially of any building with certain conditions which I shall mention later, shall be deemed to be the erection of a new building. That is, not that a re-erection in part of a building shall make the whole of that building the subject of the by-law as if this was a rebuilding of the whole, but it is that the re-erection shall be deemed to be a new erection or the erection of a new building. The expression "wholly or partially" is of some importance. I think the district council may have rightly considered that this was in part the erection of a building or the erection of a part of a building which shall be deemed, as to that part of the building or as to part of the re-erection of it, a new building. The arguments against this construction are two. I do not think it can be said that the expression if an outer wall is pulled down or pulled down to within ten feet of the surface of the ground is one which will suit exactly every case, because it may be the outer wall itself is the only thing re-erected, and I should have been happier if the phrase had been "where the outer wall has been pulled down." But the truth is that this clause is only put in to explain the extent to which pulling down is to be deemed to be a complete pulling down; it need not be that the building should be pulled down to the surface, it is enough if it is pulled down to within ten feet of the surface; then you are to consider the whole to be built up from the bottom. In most cases it will be the re-erection of some building which has an outer wall to it; possibly in cases where it is a re-erection of part it will be the re-erection of the outer wall only. I do not think that reading the expression relating to

the particular case which arises militates against the general construction which I put upon the section.

The other point is a familiar form of contention, that, if that be so, there is too much in (*d*), and you do not want the words "so far as regards the addition only." If that be so, these words do not interfere with the plain grammatical construction of the sentence which makes this Act apply to cases where so small a portion of the old building is going to be re-erected as not to make it a re-erection of the whole, but where, nevertheless, it is desirable that that portion should be built up in accordance with the modern view of architectural requirements. This being a satisfactory and sufficient meaning to be given to the section is in my view the right one.

Therefore I agree that this appeal succeeds.

BANKES L.J. I agree. The question we have to determine is as to what is the proper construction of s. 23 of the Act of 1907. In order to determine that point it is necessary to consider two sections of the Act of 1875, and those two sections are s. 157 and s. 159. Sect. 157 is the section which gives the urban authority power to make by-laws. It gives power with respect to a number of matters, but the only important one to consider for this purpose is that contained or those contained in sub-s. 2, which provides that they have power to make by-laws with regard to the "structure of walls, foundations, roofs and chimneys of new buildings for securing stability and the prevention of fires, and for the purposes of health." So far as that sub-section is concerned, it confines the power to make by-laws with reference to new buildings. Of course it is open to the Legislature to provide that new operations, which, apart from legislation, would not be or might not be considered the erection of a new building, should be deemed to be for the purposes of this Act and section a new building, and, so far as the Act of 1875 is concerned, s. 159 does provide that certain building operations and the erection or re-erection of a building under certain circumstances shall be—it does not use the word "deemed," but it uses the word "considered"—to be the erection of a new building. That section deals with four cases, which are "the re-erecting of any building pulled down to or below the ground floor or the re-erecting of any frame building of which only the framework is left down to the ground

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floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation, or the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only." So that so far as the Act of 1875 is concerned the making of by-laws in respect of certain matters is confined to the case of the erection of a new building, but in the four instances I have given the statute says that they shall be considered to be the erection of a new building. Upon the construction of s. 159 there have been a number of cases, and it has been clearly laid down that it is a question of fact as to what amounts to a re-erection, and it is a question of degree. As a result of those decisions it follows that there may be many re-erections of parts of buildings which are not in themselves the erection of new buildings and which are not for the purposes of this Act to be deemed to be new buildings, and as to such re-erection there is no power to make by-laws and the by-laws can have no operation. Therefore that class of building operation is free from the control of the local authority. This particular local authority made a number of by-laws, and the by-law in question in this case is No. 104, which has reference to the submitting of plans, and the by-law is in these terms: "Every person who shall intend to erect a building shall give to the council notice in writing." If that language is extended in accordance with the provisions of the Act of Parliament it would read: "Every person who shall intend to erect a new building or a building which for the purposes of the Act shall be deemed to be a new building shall give to the council notice in writing." For a great many years the class of re-erection which did not come within s. 159 was untouched by legislation and, as I have said, was not under the control of local authorities; but then we come to the Act of 1907, which has been applied in this district, and the contention is that s. 23 of that Act applies to all re-erecting operations, and that the moment you get any re-erecting operation the effect of the statute is not only to provide that the re-erection itself shall be deemed to be a new building so as to be under the control of the local authority, which it was not before, but that the old building shall be deemed to be part of a new building. The first answer to that contention is that that is not what the statute says. It is urged strenuously that that is what the statute ought to mean because

of the grave consequences if you do not so read it. It seems to me that the statute is plain in its language and was passed to meet a plain want and nothing more, and the want was a re-erection which under the statute of 1875 was not sufficient to be deemed to be a new building, but yet which is sufficient of itself to be such as that it ought to come under the control of the local authority and come within their by-laws. The language of the statute seems to me plain. It says: "For the purposes of this Act and the Public Health Acts and any by-laws made thereunder each of the following operations . . . . shall be deemed to be the erection of a new building." What is the operation in question here? It is the operation of re-erecting. What does the statute say about that? It says: "the re-erection, wholly or partially, of any building of which an outer wall is pulled down or burnt down to or within ten feet of the surface of the ground adjoining the lowest storey of the building, and of any frame building so far pulled down or burnt down as to leave only the framework of the lowest storey." So it confines the re-erection to the re-erection of those two classes and says with regard to those re-erections—whether they are wholly re-erections or partial re-erections is immaterial—but the re-erection shall be deemed to be the erection of a new building. I fail to see anything in the statute to indicate that the language of the statute ought to be extended beyond what it plainly says, that the re-erection shall be deemed to be a new building. Of course, if that is the true construction, it follows that the by-law which reads that anybody who shall intend to erect a new building or a building which shall be deemed to be a new building shall submit plans means that he is only compellable to submit plans with regard to the re-erected part. Mr. Jeeves has put two points before us which he says are of great importance and which deserve consideration. The two points are these. He says, look at the distinction between sub-s. (*a*) and sub-s. (*d*), and he says the effect, and the necessary effect, of accepting the argument here for the appellants is that the by-law in question with regard to a wall being pulled down to or within ten feet of the ground only applies to the new part of the wall superimposed upon the old part and the by-law will have no operation as regards the portion of the wall that remains. I do not in the least agree on either point. I think the distinction

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between sub-ss. (*a*) and (*d*) is strongly in favour of the argument of the appellants, and for this reason, that sub-s. (*d*) provides for "the making of any addition to any existing building by raising any part of the roof, by altering a wall or making any projection from the building, but so far as regards the addition only." Take the case of raising any part of the roof. As to that, the statute says that the addition only shall be deemed to be a new building, and the result would be that the raising of the roof would have to comply with all the provisions of the by-laws as to air space and matters which had reference to it, but the statute does not apply the provision that the re-erection shall be deemed to be a new building to the existing walls; but when you come to consider sub-s. (*a*) the provision of the statute there is that the re-erection, not of the particular wall, but of the building, shall be deemed to be a new building, and that exactly meets the case put by Mr. Jeeves, as I understand it, of a building (we will say) having two wings, and with regard to one wing the front outer wall is pulled down and the back outer wall is pulled down. What is to happen with regard to the rooms of that building? Are they affected by the section or not? My answer is that they clearly are affected, because what the section says is "the re-erection wholly or partially of any building," and where you have pulled down the front outer wall and the back outer wall of a wing and start to rebuild them you are re-erecting that portion of the building, and it is the re-erection of the building, or that part of the building, which is to be deemed a new building. In my opinion the language of the section is reasonably plain, and I think that the decision of the Divisional Court which directed that the plans had to be delivered of this re-erection was wrong, and the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Sandilands & Co.*
Solicitors for respondents: *White & Leonard.*

W. J. B.

LANCASHIRE AND YORKSHIRE RAILWAY COMPANY *v.* SWANN.

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Dec. 13, 14.

Railway—Regulation — Demurrage on Trucks — Receiver of Goods—Privity of Contract—Computation of Time for unloading—Railway Rates and Charges No. 10 (*Lancashire and Yorkshire Railway, &c.*) *Order Confirmation Act,* 1892 (55 *&* 56 *Vict. c. xlviii.*), *Schedule, s.* 5, *sub-s.* 4.

A Railway Act empowered the railway company to charge traders a reasonable sum by way of addition to the tonnage rate for, inter alia, the detention of trucks beyond such period as should be reasonably necessary for enabling the consignee to take delivery thereof.

Two truckloads of goods arrived by rail at the plaintiffs' station on a Friday consigned to a certain person who gave notice to the plaintiffs to transfer the goods to the defendant. An advice note was sent on the same day to the defendant stating that demurrage would be charged at a specified rate per wagon per day or part of a day if the goods were not unloaded and removed within forty-eight hours after the despatch of the notice, and that the defendant was to send for the goods not later than 6 P.M., and on Saturdays not later than 1 P.M. The defendant received the notice on the Saturday, and the unloading of the trucks was proceeded with up to 1 P.M. on that day and on Monday and was finished on Tuesday. The plaintiffs claimed demurrage in respect of the detention of one of the trucks on the Tuesday :—

Held, that the receipt and acceptance of the advice note by the defendant constituted privity of contract between the plaintiffs and the defendant ; that in calculating the period of forty-eight hours the whole of each day, excluding Sunday but including the time after 1 P.M. on Saturday, was to be counted ; and that the defendant was, therefore, liable for the demurrage claimed.

APPEAL from the county court of Lancashire holden at Chorley.

On Friday, March 7, 1913, two truckloads of mangolds, consigned to one Moss, arrived at the Midge Hall Station on the plaintiffs' railway, and on the same day Moss gave written notice to the plaintiffs' agent at Midge Hall to transfer the goods to the defendant and to debit his (Moss's) account. On the evening of March 7 an advice note in the following terms was sent by the plaintiffs' agent to the defendant : "Mr. T. Swann, Leyland. The undermentioned

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goods, consigned to you on the conditions shown on the back hereof, having arrived at this station, I will thank you for instructions as to their removal hence as soon as possible, as they remain here to your order, and are now held by the company—not as common carriers, but as warehousemen—at owner's sole risk, and subject to the company's ordinary wharfage and demurrage charges. Demurrage at the rate of three shillings per wagon per day, or part of a day, ... will be charged on the traffic mentioned below if not unloaded within two days, the goods having been received by the company upon the terms (amongst others) that they shall be removed within forty-eight hours after the despatch of notice to the consignee of the arrival of the goods, or incur the above charges for demurrage. When you send for the goods, please to send this note, and not later than six o'clock P.M. On Saturdays, not later than one o'clock P.M. . . . . " The advice note was received by the defendant on the morning of Saturday, March 8. The unloading of the trucks was proceeded with by the defendant's servant on Saturday, March 8, up to 1 P.M. and on Monday, March 10, and it was finished early on Tuesday, March 11. The plaintiffs claimed in this action 1*s.* 6*d.* demurrage alleged to be due by reason of the unloading not having been completed on Monday, March 10. (1) The defendant stated at the trial that he raised no objection to the jurisdiction of the county court judge.

The county court judge gave judgment for the defendant. He held, first, that the defendant was not the consignee of the goods, but merely a man authorized by Moss, the consignee, to receive the

(1) Sect. 5, sub-s. 4, of the Schedule of Maximum Rates and Charges in the Railway Rates and Charges No. 10 (Lancashire and Yorkshire Railway, &c.) Order Confirmation Act, 1892 (55 & 56 Vict. c. xlviii.), which confirmed a provisional order of the Board of Trade made under the Railway and Canal Traffic Act, 1888, enacted as follows: "The company may charge for the services hereunder mentioned, or any of them, when rendered to a trader at his request or for his convenience, a reasonable sum by way of addition to the tonnage rate. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party . . . .

. . . . . .

"(iv.) The detention of trucks . . . . beyond such period as shall be reasonably necessary for enabling the . . . . consignee to . . . . take delivery thereof . . . ."

goods, and that the sending of the advice note to the defendant did not create privity of contract between the plaintiffs and the defendant, and that the claim was misconceived; secondly, that if privity of contract had been established the defendant had not failed to comply with the conditions as to unloading, because in the opinion of the county court judge the plaintiffs, in imposing the condition as to the time for unloading, impliedly undertook to allow the defendant access to the station premises during the day, and if the time after 1 P.M. on the Saturday was not to be reckoned, the goods had been received within two days, or forty-eight hours; and, thirdly, that the condition was unreasonable.

The county court judge gave the plaintiffs leave to appeal on condition that they paid the costs in any event.

Eustace Hills and *Liversidge*, for the plaintiffs. It is not admitted that it was necessary for the plaintiffs to show that privity of contract had been established between them and the defendant, because the charge for demurrage is a statutory charge, but the receipt and acceptance of the advice note by the defendant, who acted on it, clearly did create privity of contract. The county court judge was wrong in holding that in ascertaining whether demurrage was payable the time after 1 P.M. on Saturday did not count. The advice note, which contains the terms of the contract, limits the time during which the actual work of unloading can be carried on by providing that it must be done before 6 P.M. on ordinary working days and before 1 P.M. on Saturdays. But demurrage is payable if the goods are not unloaded in two days and removed within forty-eight hours of the despatch, not the receipt, of the advice note. This period of forty-eight hours is in no way affected by the limitation as to the actual working time. If the third finding of the county court judge, that the condition was unreasonable, means that the time allowed for unloading was unreasonably short, that is a question which could not be raised in the action, for it was a "difference" within s. 5, sub-s. 4, of the schedule in the company's Act of 1892, and could only be determined by arbitration as provided by that section. The word "trader" in that section is defined by s. 26 as including any person receiving

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merchandise by the railway. [They referred to *London and North Western and Great Western Joint Ry. Cos.* v. *Billington* (1); *North Eastern Ry. Co.* v. *Ferens* (2); *North British Ry. Co.* v. *Coltness Iron Co.* (3); *London and North Western Ry. Co.* v. *Crooke* (4); *Watkins* v. *Rymill.* (5)]

S. Duncan, for the defendant. The county court judge has found as a fact, on the evidence, that the defendant was not the consignee of the goods, but was merely a person nominated by the consignee to receive them. This Court cannot reverse that finding of fact. It is not denied that, if a question arose as to the reasonableness of the length of time allowed for unloading, that would be a matter for arbitration, but the question of the reasonableness of the contract as a whole is one within the jurisdiction of the county court judge, and he has found that this contract is unreasonable. It says that demurrage will be charged if the goods are not unloaded within two days, and then it goes on to say that the goods must be removed or demurrage incurred within forty-eight hours of the despatch of the advice note, so that demurrage might conceivably become chargeable before the consignee knew of the arrival of the goods. But s. 5, sub-s. 4, only authorizes the railway company to charge for "the detention of trucks," and a trader cannot be said to have detained a truck when he does not know of its arrival. The defendant did in fact complete the unloading within forty-eight hours of the receipt of the advice note. The terms of the advice note are also unreasonable in that it states that the goods are held by the company not as common carriers, but as warehousemen at the owner's sole risk, whereas the common law liability of a carrier continues until notice of the arrival of the goods is received by the consignee. [He referred to *Midland Ry. Co.* v. *Loseby* (6); *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Brown* (7); *Caledonian Ry. Co.* v. *Lanarkshire Coalmasters' Association.* (8)]

LORD COLERIDGE J. Certain goods were consigned to one Moss. He ordered the railway company to transfer them to the defendant.

(1) [1899] A. C. 79.
(2) (1911) 15 Ry. & Ca. Tr. Cas. 17.
(3) (1911) 14 Ry. & Ca. Tr. Cas. 246.
(4) (1904) 20 Times L. R. 506.
(5) (1883) 10 Q. B. D. 178.
(6) [1899] A. C. 133.
(7) (1883) 8 App. Cas. 703.
(8) (1911) 27 Times L. R. 221.

The goods arrived at the plaintiffs' station on March 7, and an advice note was despatched to and received by the defendant, who went to the station and took delivery of the goods. It is said that these facts do not show any privity of contract between the plaintiffs and the defendant. I think they do. The defendant received the advice note and acted on it by taking delivery, and, whether he is regarded as being responsible for delivery under the original contract of carriage or under a fresh contract, the case of *Watkins* v. *Rymill* (1) shows that he was bound by the conditions in the advice note. He was also a "trader" within the definition in the plaintiffs' Act and therefore a person whom the plaintiffs were entitled to charge a reasonable sum if he detained the plaintiffs' trucks beyond such period as was reasonably necessary. I think the county court judge was wrong in holding that there was no privity of contract between the plaintiffs and the defendant.

The next point arises on the terms of the contract, and the question is whether the plaintiffs are entitled to charge the defendant 1*s.* 6*d.* demurrage for the detention of a wagon for one day. [The learned judge read the advice note.] The notice was despatched on Friday, March 7, and it is admitted that, if Saturday is to count as a day, inasmuch as Saturday and Monday passed without the completion of the unloading of the trucks, there was a part of the goods which was not unloaded within two days, or forty-eight hours, within the meaning of the contract. But it is said that a day means a working day of twenty-four hours. I think that the language of the advice note shows that that is not a sound contention, for a part of a day is alluded to in the contract as a day, and on the true construction of the contract it is manifest that Saturday was to count as a day for the purpose of calculating the two days within which the delivery of the goods was to be taken. Then it is said that the forty-eight hours ought to be calculated not from the despatch of the notice, as provided in the contract, but from the receipt of the notice, and that if the contract be construed in that way the facts show that the unloading was completed in forty-eight hours from the receipt of the notice. That contention simply amounts to this, that if the language of the contract is given its ordinary and literal meaning, the time allowed for unloading was unreasonably

(1) 10 Q. B. D. 178.

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short, but that is one of the cases as to which s. 5, sub-s. 4, of the company's Act says that the difference shall be referred to arbitration, and the county court judge had no jurisdiction to deal with the question whether the terms of the contract gave the defendant an unreasonably short time in which to unload the goods.

For these reasons I am of opinion that this appeal must be allowed.

Low J. I am entirely of the same opinion.

Appeal allowed.

Solicitors for plaintiffs: *Woodcock Ryland & Parker, for A. de C. Parmiter, Manchester.*

Solicitors for defendant: *Mellor & Co., for Rawsthorn, Ambler & Booth, Preston and Leyland.*

F. O. R.

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Aug. 30; *Sept.* 6.

THE KING *v.* SUPERINTENDENT OF VINE STREET POLICE STATION.

Ex parte LIEBMANN.

Alien Enemy—Prisoner of War—Non-combatant—Prerogative of Crown to imprison—Jurisdiction of Court of King's Bench to interfere with Exercise of Prerogative—Writ of Habeas Corpus.

A German subject who has obtained his discharge from German nationality but has not become a naturalized British subject is, under the provisions of the German law, in a privileged position and does not become entirely divested of the rights belonging to a natural-born German. He is therefore an alien enemy.

Ex parte Weber, post, p. 280, note, followed.

The Crown is entitled in the exercise of its prerogative to imprison an alien enemy, and the King's Bench Division has no jurisdiction to interfere with the exercise of the prerogative. An alien enemy resident in the United Kingdom, who, in the opinion of the Executive Government, is a person hostile to the welfare of this country and is on that account interned, may properly be described as a prisoner of war although not a combatant or a spy; and an application by him for a writ of habeas corpus will be refused.

In this case a summons was taken out, returnable before Low J. at chambers, to show cause why a writ of habeas corpus should not

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be issued on the application of Alfred Liebmann, who was in the custody of the superintendent of police at Vine Street Police Station, in accordance with a "notice of intended internment of an alien enemy," which was signed by the police superintendent and had been served upon the applicant by a police constable, the notice proceeding to state "that it is intended to intern you as a prisoner of war." An application was made to the learned judge on behalf of the Attorney-General, and was consented to by the applicant, that the matter should be heard by a Divisional Court and that the hearing should be treated as if a rule nisi had been granted and the Crown appeared to show cause against the rule. This arrangement was made because of the great importance of the questions raised and the number of persons in the same position as the applicant.

The applicant was born at Mannheim in 1868. He resided in Germany until 1889, serving a year in the German Army. In 1889 he came to England, and had resided here ever since. In 1890 he obtained a document purporting to discharge him from German nationality, but he had taken no steps to naturalize himself here. In August, 1914, he registered himself as an "alien enemy" under the Aliens Restriction Order. In an affidavit made by him in support of his application he stated that he registered himself as a precaution, although he knew that he was not a German subject, as he could not at the time find his document of discharge; that he subsequently found the document, and applied to the police to cancel the registration, but that they refused to do so. He also stated that later he applied to the Home Office Advisory Committee to exempt him from internment, and that that application was refused.

Sir F. E. Smith, *S.-G.*, and *Branson* showed cause. The Court has no jurisdiction to grant a writ of habeas corpus on the application of a prisoner of war: *Rex* v. *Schiever* (1); *Furly* v. *Newnham* (2); *The Three Spanish Sailors.* (3) The applicant is a prisoner of war. Any alien enemy who in time of war is for reasons of public policy legally placed under restraint is a prisoner of war. No distinction can be drawn between an alien enemy who is captured

(1) (1759) 2 Burr. 765. (2) (1780) 2 Doug. 419.
(3) (1779) 2 W. Bl. 1324.

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on the field of battle and one who is interned upon grounds of public policy. The Court of King's Bench safeguards the rights of British subjects and has therefore to be satisfied that the applicant is not a British subject. The Crown by virtue of its prerogative has the right to intern an alien, and that power is not limited to aliens. It is, however, unnecessary in the present case to raise the point whether the Crown by virtue of its prerogative has the right to intern a friendly alien or naturalized person of alien origin. Some powers exercised by the Crown are conferred or defined by statute, but some also exist by virtue of custom or common law. The term "prerogative" should properly be limited to the ancient customary powers of the Crown (see Anson's Law and Custom of the Constitution, 3rd ed. vol. 2, part i., p. 2). Dicey defines prerogative as "the discretionary authority of the Executive," and he explains that that means everything which the King or his servants can do without the authority of an Act of Parliament. It is impossible to define the boundaries of the Royal prerogative, but the internment of alien enemies is part of the discretionary power of the Executive, and therefore the terms of the Aliens Restriction Act, 1914 (4 & 5 Geo. 5, c. 12), and the Orders made thereunder are immaterial. The Act of 1914 was not passed in consequence of the absence of power in the Crown to intern aliens, but in order to give notice of the powers of the prerogative, and by s. 1, sub-s. 6, the powers of the Crown are expressly preserved. It is true that there is no authority in the books for the proposition that the Crown by virtue of its prerogative has the right to control the liberty of aliens, the reason being that the necessity of so controlling them has never before arisen. The power would only be used in times of stress and danger. It is not contended that the Habeas Corpus Act is suspended by the war.

The internment of the applicant can, if necessary, be justified under the terms of the Aliens Restriction Act, 1914, and the Orders made thereunder. By s. 1, sub-s. 4, the onus of proving that he is not an alien lies upon the applicant. The Secretary of State has power under clause 17 of the Aliens Restriction (Consolidation) Order, 1914, to require alien enemies to reside in certain specified areas, and under clause 19 aliens are bound to register themselves in accordance with the requirements of the clause. The Secretary

of State has power under clause 30, in the interests of public safety, to direct that the provisions of the Order as to alien enemies shall in particular cases be applicable to other aliens. The Secretary of State is, however, unwilling to act under that clause, as he would have to investigate individual cases. "Alien enemy" is defined in clause 31 as meaning an alien whose Sovereign or State is at war with His Majesty.

The applicant has never been naturalized as a British subject, and is therefore regarded by the law of this country as of German nationality. The document of discharge from German nationality which the applicant obtained from the German Government is immaterial for this purpose, because the question is not what the German Government considers to be a good discharge from German nationality but whether the document has been recognized in this country as being a good discharge. The law of this country does not allow a person to be in the position of having no nationality. Under German law (1) a German subject who has lost his German nationality is nevertheless in a preferential position to persons of

(1) German Imperial and State Nationality Law, July 22, 1913 :—

Sect. 8 : "A foreigner who has settled in Germany ["im Inland"] may be naturalized, on his application, by the Federal State in whose territory such settlement has taken place—

"1. If according to the laws of his previous home State, he is absolutely capable of transacting business ["geschäftsfähig"], or would be absolutely capable of transacting business in the eye of German law, or if the application is made in accordance with s. 7, paragraph 2, sentence 2, by his legal guardian or with his assent.

"2. If he has led an irreproachable life.

"3. If he has found a dwelling of his own or lodgings in the place where he has settled.

"4. If he is in a position to keep himself and his family in this place.

"Before naturalization, the municipality of the place of settlement must be applied to for information respecting the requirements of Nos. 2—4, and also the board of guardians ["Armenverband"] if the municipality does not itself form an independent board of guardians."

Sect. 13 : "A former German, who has not settled in Germany ["im Inland"] may be naturalized on his application by the Federal State to which he formerly belonged if he fulfils the requirements of section 8, paragraph 1, Nos. 1, 2 ; the child or adopted child of a former German has the same legal position.

"The Imperial Chancellor is to be informed before naturalization ; naturalization does not take place if the Imperial Chancellor raises objections."

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other nationalities with regard to reclothing himself with German nationality, and in *Ex parte Weber* (1) it was held by the Court of Appeal that he does not completely lose his German nationality. Therefore, as the applicant has not sworn allegiance to any other Sovereign, his nationality of origin continues, and he must be considered to be an alien enemy.

T. M. Healy, K.C., and *W. Frampton*, for the applicant. There is no power in the Crown by virtue of its prerogative to arrest even an alien enemy unless he is a combatant or a spy. There is ample power to deal with spies under the Defence of the Realm Act, 1914 (4 & 5 Geo. 5, c. 29), and the Orders made thereunder, but that Act does not confer power upon the naval and military authorities to arrest an alien enemy. The contention that the Crown has powers under its prerogative to arrest a person not charged with treason, felony, or misdemeanour would, if sound, make a great inroad upon the freedom of the subject. The Crown by virtue of its prerogative would have power to arrest not merely aliens but also British subjects in time of peace as well as war. In *Rex* v. *Oppenheimer and Colbeck* (2) and *Ex parte Weber* (1) it was not contended that the authority for the arrest was the prerogative of the Crown. It was assumed that there was statutory authority. Further, there is the fact that it was thought necessary to pass the Aliens Restriction Act, 1914. Under that statute and the Order made thereunder power is given to deal with every case of alienage, but not to restrain the liberty of aliens by confining them in prison. If it was necessary for the Executive to obtain statutory power to prohibit an alien enemy from travelling more than five miles from his registered address (see clause 21 of the Aliens Restriction (Consolidation) Order, 1914) it is also necessary for it to obtain statutory power to enable it to confine aliens against whom no charge is brought.

In *Rex* v. *Schiever* (3), *Furly* v. *Newnham* (4), and *The Three Spanish Sailors* (5) the men imprisoned were taken in arms fighting against the British troops and were clearly prisoners of war, but the applicant has for many years been carrying on a legitimate

(1) See note on p. 280, post.
(2) [1915] 2 K. B. 755.
(3) 2 Burr. 765.
(4) 2 Doug. 419.
(5) 2 W. Bl. 1324.

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trade in England and is in no sense open to suspicion. He is therefore not a prisoner of war, and those cases afford no authority for refusing to grant his application for the writ of habeas corpus. The Court has jurisdiction to grant a writ of habeas corpus even in the case of an alien enemy; but the applicant is not an alien enemy, as he obtained his discharge from German nationality. He ought therefore to be considered as an alien friend. In *Ex parte Weber* (1) the applicant lost his German nationality merely by long residence abroad and was entitled under German law to a preferential position with regard to regaining his German nationality, but the present applicant is in no better position in that respect than he would be if he were a person of British nationality desirous of acquiring German nationality.

Cur. adv. vult.

Sept. 6. The following judgments were read:—

BAILHACHE J. This is an application for a writ of habeas corpus by one Alfred Liebmann, who is interned at Vine Street Police Station. He was interned on August 17, 1915, in pursuance of a notice sent to him by a superintendent of the Metropolitan Police, which, so far as is material, is in these terms: "Take notice that it is intended to intern you as a prisoner of war on Tuesday, August 3, 1915." This notice was issued, we are told, by authority of the Home Secretary. The facts are that Liebmann was a German subject born in Germany in 1868. He came to England for business reasons in 1889, and has resided and carried on business in England ever since. In May, 1890, he obtained a formal discharge from German nationality, his particular state being Baden. He never became naturalized as an English citizen.

The case was treated by consent as if a rule nisi had been granted, and the Crown, by the Solicitor-General, showed cause against the rule. In so doing the Solicitor-General took the preliminary point that no writ of habeas corpus will issue in the case of a prisoner of war, and alleged that Liebmann is a prisoner of war. We decided to hear argument on the whole case before dealing with the preliminary objection, and the Solicitor-General then made the further point that the Home Secretary in interning Liebmann was

(1) See note on p. 280, post.

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acting in exercise of the Royal prerogative to imprison alien enemies in time of war and that Liebmann was an alien enemy.

Mr. Healy, who appeared for Liebmann, argued that Liebmann was neither a prisoner of war nor an alien enemy, and further he denied the existence of any such Royal prerogative as that asserted. It appeared from the argument on behalf of the Crown that the contention that the Crown could, by virtue of its inherent prerogative, imprison civilians during a time of war was not limited to alien enemies, although it was not necessary to claim any higher or further prerogative in this case.

If the preliminary objection raised by the Crown is sound, the second point, which is one of supreme constitutional importance, does not arise. It will be convenient, therefore, to consider the preliminary objection first. In so doing the question whether Liebmann is an alien enemy is so closely connected with the question whether he is a prisoner of war that it is necessary to discuss and determine both those points. I will consider in the first place whether Liebmann is an alien enemy. He denies it, and claims that he is a person of no nationality. I have had the advantage of reading the judgment about to be delivered by Low J. He has so fully dealt with this point that it is sufficient for me to say that I agree with the conclusion at which he has arrived. I agree, too, that this point is covered by the decision of the Court of Appeal in *Ex parte Weber*. (1) There is a distinction between the two cases in that in *Ex parte Weber* (1) nationality was lost by long residence abroad, while in this case Liebmann obtained a formal discharge from German nationality; but in my judgment this distinction makes no difference in principle. The applicant is an alien enemy.

Next, is Liebmann a prisoner of war? It is at first sight somewhat startling to be told that a civilian resident in this country, interned by the police on the instructions of the Home Secretary, can be accurately described as a prisoner of war. One generally understands by a prisoner of war a person captured during warlike operations by the naval or military forces of the Crown, or perhaps a civilian arrested as a spy. I think, however, that the Courts are entitled to take judicial notice of certain notorious facts which may be summarized thus: There are a large number of German subjects

(1) See note on p. 280, post.

in this country. This war is not being carried on by naval and military forces only. Reports, rumours, intrigues play a large part. Methods of communication with the enemy have been entirely altered and largely used. I need only refer to wireless telegraphy, signalling by lights, and the employment on a scale hitherto unknown of carrier pigeons. Spying has become the hall-mark of German "kultur." In these circumstances a German civilian in this country may be a danger in promoting unrest, suspicion, doubts of victory, in communicating intelligence, in assisting in the movements of submarines and Zeppelins—a far greater danger, indeed, than a German soldier or sailor.

I have come to the conclusion that a German subject resident in the United Kingdom, who in the opinion of the Executive Government is a person hostile to the welfare of this country and is on that account interned, may properly be described as a prisoner of war, although not a combatant or a spy.

I have gone at such length into this part of the case for several grave reasons. It is, I believe, settled law that no writ of habeas corpus will be granted in the case of a prisoner of war. The cases cited on behalf of the Crown—*Rex* v. *Schiever* (1), *Furly* v. *Newnham* (2), and *The Three Spanish Sailors* (3)—are conclusive on the point. If, therefore, Liebmann is in fact a prisoner of war, as I hold he is, his application must fail.

Another reason is that there is, I understand, no precedent, except in the case of a spy, which covers the case of a civilian subject of a Power at war with this country. The cases above referred to are all cases of combatants—prisoners of war in the ordinary acceptation of that term. As the preliminary objection succeeds it is unnecessary to say more; but these Courts are specially charged to safeguard the liberty of the subject as one of their most sacred duties. The Courts owe that duty not only to the subjects of His Majesty, but also to all persons within the realm who are under His Majesty's protection and entitled to resort to these Courts to secure for them any rights which they may have, and this whether they are aliens or alien enemies. I think it right, therefore, to add that, deeply impressed as I am

(1) 2 Burr. 765. (2) 2 Doug. 419.
(3) 2 W. Bl. 1324.

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with the sanctity of the liberty of the subject, I cannot forget that above the liberty of the subject is the safety of the realm, and I should be prepared to hold, as at present advised, that when the internment of an alien enemy is considered by the Executive Government, charged with the protection of the realm, desirable in the interests of the safety of the realm, and the Government thereupon interns such alien enemy, the action of the Government in so doing is not open to review by the Courts of law by habeas corpus.

I trust that I have throughout made it quite clear that I have been confining my observations to the case of alien enemies. I desire with all the emphasis I can command to state expressly that I am not dealing with the case of British subjects or with aliens the subjects of neutral countries, and I trust that nothing in this judgment will be considered as having any bearing whatever upon any class of persons other than alien enemies. I desire to say this because there were some observations by the Solicitor-General as to the extent of the Royal prerogative to which I am not prepared to assent.

I cannot leave this case without a reference to Mr. Healy's argument that there can be no prerogative of the Crown to intern alien enemies, because if there were there would be no need for emergency legislation giving the King power to restrict the movements of aliens, to compel them to register themselves, and the like. His argument was that, if there is this inherent power in the Crown to imprison, there must be also inherent the power to do all the lesser acts provided for by the emergency legislation. This short résumé of Mr. Healy's argument scarcely does it justice. I felt the force of it, and must ask Mr. Healy and his client to believe that I have fully considered it. I do not know why express power to intern alien enemies was not included in the emergency legislation, or why there has been no Order in Council dealing with the subject as it now arises, but I notice that the emergency legislation reserves all the powers of the Crown. The rule nisi must be discharged.

Low J., after stating the circumstances in which the case came before the Divisional Court, continued: Accordingly this Court sat to hear the arguments, and the learned Solicitor-General showed

cause and asked that the rule should be discharged. It was alleged on behalf of the Crown (1.) that the applicant is an alien enemy; (2.) that he is a prisoner of war; (3.) that the Crown is entitled in exercise of its prerogative to imprison an alien enemy, and that this Court has no jurisdiction to interfere with the exercise of such prerogative.

The first question we have to determine is whether the applicant is an alien enemy. [Having stated the facts the learned judge continued:] The discharge from German nationality to which I have referred is said to have been granted under the provisions of a German law of 1870, which was amended by another German law of 1913. The effect of both these enactments has been already considered by the Court of Appeal in *Ex parte Weber* (1), and in my opinion that decision covers this question. It is clear on the examination of these laws that they attempt to place what is called in the later statute "a former German" in a privileged position, and that such a person can recover full German nationality (see s. 13 of the German Imperial and State Nationality Law of July 22, 1913) without even going back to Germany at all, whereas "a foreigner" (see s. 8) can only obtain German nationality after settling in Germany. It is clear, therefore, that this applicant has not become entirely divested of the rights belonging to a natural-born German, and therefore, following the decision of the Court of Appeal, I hold that the applicant is an alien enemy.

The second question is, Is he a prisoner of war? The authorities cited by the Solicitor-General—*Rex* v. *Schiever* (2), *Furly* v. *Newnham* (3), and *The Three Spanish Sailors* (4)—show, if authority were required, that a writ of habeas corpus cannot be granted on the application of a prisoner of war, even for the purpose of giving evidence, much less in order to obtain his release. We were informed that there are no other authorities and that the question as to what in the circumstances of any particular case constitutes a prisoner of war is one of first impression. Of course in cases of actual combatants, such as in the cases cited above, no question can arise, but, in my opinion, to show that a man is a prisoner of war it is not necessary for him to have been an actual combatant. War at the

(1) See note on p. 280, post.
(2) 2 Burr. 765.
(3) 2 Doug. 419.
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present moment is not, as it was in olden times, confined to easily ascertained limits. The inventions and discoveries of recent years, and especially the existing means of communication, have so widened the fields of possible hostility that there is scarcely any limit on the earth, in the air, or in the waters which it is possible to put upon the exercise of acts of hostility, and real danger to the realm may therefore exist, although impossible of discovery, at distances far from where the actual clash of arms is taking place. In addition to this, methods of warfare or ancillary to warfare have come into practice on the part of our foes which involve the honeycombing the realm with enemies, not only for the purpose of obtaining and dispatching information, but for purposes directly helpful to the carrying out of enterprises either actually warlike or eminently calculated to assist the successful prosecution of war. In a contest with people who consider that the acceptance of hospitality connotes no obligation and that no blow can be foul it would, I think, be idle to expect the Executive to wait for proof of an overt act or for evidence of an evil intent. In my opinion this Court is entitled to take judicial cognizance of these matters and, in a question so greatly involving the security of the realm, to say that where the Crown, in the exercise of its undoubted right and duty to guard the safety of all, represents to this Court that it has become necessary to restrain the liberty of an alien enemy within the kingdom, and treat him as a prisoner of war, he must be regarded for the purposes of a writ of habeas corpus as a prisoner of war.

With regard to the third question, as to the prerogative of the Crown to arrest an alien enemy, I have really answered almost as much of it as is necessary to deal with the present case when I have been dealing with question 2. I have no doubt at all that such action is quite within the Crown's prerogative. At common law an alien enemy had no rights (see *Sylvester's Case* (1)), and he could be seized and imprisoned and could have no advantage of the law of England. This position, however, has been softened by custom and by decision of the Courts, and the judgment of Sargant J. in *Princess Thurn and Taxis* v. *Moffitt* (2), approved by the Court of Appeal in *Porter* v. *Freudenberg* (3), shows that an

(1) (1702) 7 Mod. 150. (2) [1915] 1 Ch. 58.
(3) [1915] 1 K. B. 857, 874.

alien enemy registered under the Aliens Restriction Act, 1914, as this applicant is, is entitled to sue in the King's Courts (which would, I suppose, include such an application as the present) as he is resident here by tacit permission of the Crown, and so is sub protectione domini regis. He is therefore in a similar position to an alien enemy resident here under licence from the Crown. That licence, however, can be terminated at any time by the Crown, and, although this point was not presented to us in the present case, I have little doubt that it might be successfully contended that the notice of internment given by the authority of the Secretary of State is a sufficient revocation of the licence. Of course the alien enemy is protected from outrage, because in such case it is not the alien who invokes the aid of justice, but the King in vindication of his peace. Whether his licence is revoked or not, I see no reason why it should protect him in the present circumstances from being made a prisoner of war.

As this Court is specially charged as between the Crown and the subject to exercise the greatest care in safeguarding the subject's liberty, I desire, having regard to some of the arguments which were advanced in this case on behalf of the Crown, and which were strongly commented upon by learned counsel for the applicant, to guard myself from being supposed to agree with all those arguments, and particularly to say that nothing in this judgment is intended to apply to the case, should it arise, of a British subject or of a friendly alien, but only to the case of an alien enemy. I should also add that, as I understood the argument on behalf of the Crown, it was not sought to justify this arrest under any of the emergency statutes passed since the commencement of the war, or the regulations made under them, nor was it necessary to do so, and I agree with the contention of the Solicitor-General that the inherent power of the Crown to deal with alien enemies is sufficiently saved by these enactments.

I am of opinion that this rule must be discharged.

Rule discharged.

Solicitor for the Crown: *The Treasury Solicitor.*
Solicitors for applicant: *Cruesemann & Rouse.*

J. E. A.

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NOTE.

[COURT OF APPEAL.]

July 22, 26, 1915.

Ex parte WEBER.

MOTION ex parte, by way of appeal from the King's Bench Division for a rule nisi for a writ of habeas corpus.

The applicant, Antonius Charles Frederick Weber, who was born in Germany on January 30, 1883, and was not a naturalized British subject, was on July 7, 1915, interned at the prisoners of war camp at Stratford, Essex, and was there at the date of the present application. The facts as stated in the applicant's affidavit in support of the motion are set out in the judgment of Swinfen Eady L.J. The applicant's contention, shortly stated, was that by reason of his continuous residence out of Germany for ten years since August, 1898, he had under the North German statute of June 1, 1870, which was extended by a statute of January 8, 1873, to the whole of the German Empire, lost his German nationality; and in support of this contention an affidavit was made by Dr. Schirrmeister-Marshal, who had practised as an advocate in the German Courts, but who was now a naturalized British subject and an English barrister. This affidavit stated that under the said statute of 1870 Germans who left the territory of the empire and resided for ten years uninterruptedly abroad ipso facto lost their German nationality, and that, in the deponent's opinion on the facts stated in the applicant's affidavit, the applicant had ceased to be a German subject in or about the year 1908, and that, even if he had a passport or "Heimatschein," he ceased to be a German subject in or about the year 1909. It was further contended that, even if the applicant had not lost his German nationality under the statute of 1870, he had, under the provisions of s. 26 of the German Imperial and State Nationality Law of July 22, 1913 (which came into operation on January 1, 1914), lost his German nationality on attaining the age of thirty-one years, namely, on January 30, 1914; and this contention was supported by Dr. Schirrmeister-Marshal in his affidavit.

The Divisional Court (Lord Reading C.J., Darling and Lush JJ.) refused a rule upon the ground that they were not satisfied, on the facts stated in the affidavits, that the applicant had ceased to be of German nationality for all purposes.

Baty, for the motion. The applicant has lost his German nationality, and therefore being of no nationality he is by his residence here an alien friend, and as such is under a local allegiance to and under the protection of the Crown, and is entitled to a writ of habeas corpus: *Sommersett's Case* (1); *Calvin's Case* (2); *Reg.* v. *Keyn.* (3) In Oppenheim's International Law, 2nd ed. vol. 1, s. 302, it is stated that "a German

(1) (1772) 20 How. St. Tr. 1. (2) (1608) 7 Rep. 1a, 6a.
(3) (1876) 2 Ex. D. 63, 150.

ceases to be a German subject through the mere fact that he has emigrated and stayed abroad for ten years without having undertaken the necessary step for the purpose of retaining his nationality." [He also referred to the decision of a German Court in 1893, cited in the Journal du Droit International Privé, vol. 20, p. 906; Westlake's International Law (ed. 1910), part 1, p. 237; Aliens Restriction Orders Consolidated, art. 30, Manual of Emergency Legislation, Supplement 3, p. 642.]

SWINFEN EADY L.J. This is an application by way of appeal from an order of the Divisional Court for a rule nisi for a writ of habeas corpus. The Divisional Court refused the rule. Assuming, but without deciding, that in such a case an appeal lies to this Court, I am of opinion that the application fails upon the merits.

The applicant is thirty-two years of age. He was born on January 30, 1883, at Neuwied, in the Rheinprovinz in Germany. He left Germany in August, 1898, that is, when he was between fifteen and sixteen years of age, and went to South America, and after residing there between two and three years he came to England, where he has resided continuously since about January, 1901. In January, 1903, he married his present wife, Johanna Maria, the widow of John van Rhyn, a Dutch gentleman. The lady was herself originally of Dutch nationality. She was a widow with three children, and there have been two children born of the marriage with the applicant. He states that he lives with his wife in Hackney, and that his occupation is, and has been continuously since 1901, that of confidential clerk and cashier at the London office of M. Simon Milandre, a French gentleman who resides and carries on business near Paris as a dealer in poultry. He has been interned, and the ground of his present application is that he is not an alien enemy, his contention being that he is of no nationality. Born in Germany, and having lived in Germany until he was just over fifteen years of age, he says that he has lost his German nationality by virtue of the law passed on June 1, 1870, just before the Franco-German war, which provides that Germans who leave the territory of the confederation and reside for ten years uninterruptedly abroad ipso facto lose their nationality; he states that the term of ten years is calculated from the moment of their leaving German territory, or in case they are in possession of a passport or "Heimatschein" (as to which there is some conflict what exactly the document is) from the moment those papers cease to have currency, that is to say, one year after the date of their issue. In one of the documents this "Heimatschein" is translated as being a certificate of nativity. Dr. Schirrmeister-Marshal, who was formerly a German subject but is now an English barrister naturalized in this country, states that the true and proper translation of "Heimatschein" is not a certificate of nativity; he says that it is mistranslated in the official English translation, and that it is a document prepared by the authorities of one federal State certifying that the person named in it is a subject of that State, and that such certificate was in use chiefly when the subject of one federal State intended to

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visit another, in which case a passport was unsuitable, and that such certificates have now become obsolete.

In support of the application Dr. Schirrmeister-Marshal states, as a matter of legal opinion, that in the statute of 1870 there is no exception of minors, persons under twenty-one, and that it has been judicially determined in Germany that the mere expiration of the statutory period—that is, the statutory period of ten years or eleven years, as the case may be—is sufficient in all cases to deprive the party of his German nationality.

A new statute has been passed in Germany dated July 22, 1913. Dr. Schirrmeister-Marshal says that that statute is not retrospective, and cannot affect the position of the applicant as to nationality. I am not satisfied as to that. He further says that, if the applicant had not already lost his German nationality under the Act of 1870, as in his opinion he undoubtedly had, then under the provisions of s. 26 of the Act of 1913 he lost it on attaining the age of thirty-one years. In my opinion the applicant has failed to establish that he has lost for all purposes his German nationality. It is said that the law of 1870 was passed in order to free the German Government from the burden of protecting persons abroad who had been absent for that period of time; but it is manifest, when the provisions of the laws of 1870 and 1913 are compared, that the applicant has not lost his German nationality for all purposes whatever. If he were to return to Germany, and if, in the language of s. 26 of the law of 1913, he were to prove "that no blame attaches to him," "the federal State to which he formerly belonged may not refuse to naturalize him"; that is to say, he has that right. Moreover, in certain cases a person who has lost his nationality under the circumstances I have mentioned, even if he has in the meantime acquired a foreign domicil, may, without returning to Germany, according to the language of the statute recover his nationality. In other words, although his position may be affected by his absence from Germany, he has not entirely lost his nationality of origin. In these circumstances I am of opinion that the applicant has failed to establish by the evidence which he has adduced that he is not an alien enemy. It is sufficient to say that he has failed to satisfy me that he has ceased to be of German nationality. He is therefore not entitled to have recourse to this Court for a writ of habeas corpus.

PHILLIMORE L.J. I take the same view. Looking at the two German statutes together and at Dr. Schirrmeister-Marshal's affidavit and at the quotations from the authorities to which we have been referred, it appears that a German who has either been away from Germany for ten years, or, under the law of 1913, has been away from Germany till he is past the ordinary age of military service, which is taken as being at the latest the end of his thirty-first year, without taking any precaution as to his liability to military service, in either case loses to a certain extent his nationality. But in neither case does he lose it, as far as I can make out, to such an extent that he has no rights and no duties derived from his nationality of origin. He loses the benefit of

protection. If, however, he returns to his native country before he has completed his thirty-first year, he is liable to be called upon to serve. If he returns after he has completed his thirty-first year and can offer a good excuse, he may be readmitted to German nationality. I take it that he is readmitted if he is made to serve, which I think must be the intention of the law, and he may be readmitted although he is not made to serve. He has power to recover his nationality, and I understand that he may apply for German nationality to the federal State to which he originally belonged, or in certain circumstances to some other State, or to the Imperial Chancellor, so as to be a direct subject of the empire without belonging to any one of the States of the empire. Dr. Schirrmeister-Marshal states that the law of 1913 is not retrospective. I do not know whether he means by that to make the general observation that laws, unless so expressed, are not retrospective. If he means that there are no retrospective provisions in this law, I cannot say that I agree with the statement, because, having looked at the law, it seems to me to be obvious that ss. 30, 31, and 32 are retrospective. If he is relying on general principles, it is true that a retrospective law does not, as a rule, impose obligations ; but it may very well give rights. If there is anything in this law which gives a right to this applicant there is no objection to it on the ground that it is retrospective. I have not been able to find nor have we been furnished with any decision as to the case of a man who says that he is of no nationality. Modern national legislation has allowed persons to procure nationality in countries which are not the countries of their nationality of origin ; but it is going a step further to say that any country has recognized that a man can shake off his position as a national of the country in which he was born without acquiring the duties and responsibilities of a national of some other country. This applicant might long ago have procured nationalization in this country. He has not done so, and, as at present advised, I think that he must be taken, as far as this country is concerned, to be still retaining his nationality of origin. The fact that by his residence out of Germany he is subjected to many disabilities and that his rights of protection are very incomplete does not, to my mind, make him other than a German for the purposes of this application, and therefore an alien enemy, in which case it is not contested that the action of the Secretary of State with regard to him is warranted. I think that this application should be refused.

BANKES L.J. I agree, and have nothing to add.

Application refused.

Solicitors for applicant: *Munton, Morris, King, Gavan Duffy & Co.*

W. F. B.

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SCHAFFENIUS *v.* GOLDBERG.

[1915 S. 2616.]

Alien Enemy—Interned Non-naturalized German Subject—Contract entered into after Declaration of War with Germany—Right to enforce.

A contract between a German subject resident and carrying on business in England and a British subject also residing and carrying on business in England, entered into after the outbreak of war between Great Britain and Germany and being one in no way prohibited by any Proclamation against trading with the enemy, is not affected by the fact that the German subject subsequently becomes interned within the realm as a civilian prisoner of war; and the German subject is entitled to maintain any action otherwise competent to him in respect thereof.

The internment of a registered alien enemy does not operate as a revocation of the licence to remain in this country which is implied in registration.

Dictum of Low J. in *Rex* v. *Superintendent of Vine Street Police Station, Ex parte Liebmann*, ante, p. 268, overruled.

Action tried before Younger J. without a jury.

The action was for the recovery of money lent by the plaintiff to the defendant and damages for breach of contract, and for a declaration that an agreement in writing between the plaintiff and the defendant, entered into in England and dated March 11, 1915, was not affected by the fact that the plaintiff had been since the agreement was entered into and still was interned within the realm as a civilian prisoner of war, and that the plaintiff was entitled to maintain any action otherwise competent to him in respect thereof.

The following statement of the facts is taken from the judgment of Younger J. :—

"The plaintiff was born and bred in Germany, but he has for upwards of twenty-two years last past been resident and carrying on business in this country. He has not been naturalized, but shortly after the outbreak of the war with Germany—to be exact, on August 8, 1914—he was duly registered as an enemy alien pursuant to the provisions of the Aliens Restriction Order, 1914. Until his internment at a later date he continued to carry on his business without interruption, and in the course of it he entered

with the defendant into the agreement now in question. The defendant, a British subject residing and carrying on business in England, is skilled in the manufacture of picture mouldings, a handicraft which before the outbreak of hostilities had, it appears, become practically a German monopoly.

"The exclusion from the British market as a result of the war of German mouldings, as of all other German goods, presented a favourable opportunity for the revival of that particular industry in England, and the agreement under which the plaintiff contracted to finance the defendant in the business and to purchase from him the whole of his output before buying any mouldings from any one else was concluded between the parties so as to enable the defendant to embark upon the new manufacture adequately equipped for success.

"It is unnecessary for the purpose of this judgment to detail the provisions of the contract. They are elaborate and in some respects not too clear. It is sufficient for the moment to say that the agreement, entered into, as it was, long after the commencement of the war, was one in no way prohibited by any Proclamation against trading with the enemy. Such enemy character as the plaintiff possessed did not in any way make the arrangement unlawful on either side. Putting it at its lowest, the effect upon the agreement of the relevant Proclamation—that of September 9, 1914—was to license the defendant as a British subject to enter into the transaction with the plaintiff, resident here as he then was, and to render it as enforceable against the plaintiff as it would have been had the parties to it on both sides, and not on one side only, been British subjects resident and carrying on business in this country.

"The agreement so concluded was forthwith acted upon. Payments under it were made by the plaintiff to the defendant, and the manufacture of the mouldings was commenced and still continues. But a few months afterwards, namely, on the 1st of July, 1915, the plaintiff was interned. It is not suggested that his internment was due to any act of hostility or to any definite suspicion of espionage on his part, or to any special circumstance affecting his case. His internment was simply an incident in the general policy of interning enemy male aliens of military age, the privilege being conceded to each of bringing forward any considerations of

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hardship or merit which might appear to justify exemption in his case. Whether the plaintiff did apply to be exempted, or whether, if he did, his application has yet been granted or refused, does not appear. It is, however, the fact that he still remains interned within the realm. At the date of the plaintiff's internment considerable sums had been advanced to the defendant under the agreement. The plaintiff had appointed a Mr. Fisher under a very wide power of attorney to manage his affairs, and on June 25 a demand was made upon the defendant for repayment within a month of the moneys advanced, and on July 15 the defendant's solicitors intimated that their client was prepared to make repayment on receipt of an account of the amount due. This account was forwarded on July 19, but the defendant, having in the meantime been advised that such a repayment would be in direct contravention of the Proclamation of September 9, 1914, by his solicitors intimated that it would be impossible to make it. They had advised the defendant, they added, that the agreement was, under the same circumstances, at an end, and the defendant would take the necessary steps in the High Court to have it declared void, and then the money advanced would be paid into Court or to the custodian as might be ordered. On July 30, 1915, the defendant refused on the same ground to make any further delivery of goods to the plaintiff, and on September 7, 1915, the writ in this action was issued claiming repayment, damages, and an injunction to restrain the defendant from manufacturing picture frame mouldings for any person other than the plaintiff. By arrangement between the parties the action was set down that I might determine whether the plaintiff was under all the circumstances entitled to maintain it at all."

J. B. Matthews, K.C., and *Samuel Duncan*, for the plaintiff. The question is whether an interned German is entitled to maintain an action. He is a prisoner of war: *Rex* v. *Superintendent of Vine Street Police Station, Ex parte Liebmann.* (1) The case is covered by the decision in *Wells* v. *Williams* (2), the effect of which is stated in the headnote of the report in Lord Raymond to be that "an

(1) Ante, p. 268.
(2) (1697) 1 Ld. Raym. 282; 1 Salk. 46; 1 Lutw. 34.

alien enemy commorant here by the King's licence, and under his protection may sue, though he came in time of war without a safe conduct." The Court in giving judgment in that case said: "And as to the case in question, admit that the plaintiff came here before the war was proclaimed, (for so it may be intended), then this action is maintainable; 1. Because there was no need of a safe conduct in time of peace. 2. Though the plaintiff came here since the war, yet if he has continued here by the King's leave and protection ever since, without molesting the Government or being molested by it, he may be allowed to sue, for that is consequent to his being in protection."

The plaintiff came to this country twenty-two years ago. He requires no safe conduct and, being under the King's peace, is entitled to sue. If the licence to reside in this country involved in the registration of an alien is necessary to enable him to sue, an internment order only makes the regulations relating to him more strict, and does not operate as a repeal of the licence. Instead of having a licence to stay he is now prohibited from leaving. The effect of the decision in *Wells* v. *Williams* (1) is crystallized in Bacon's Abridgment, vol. i. (1832 ed.), p. 183, where it is said: "If an alien amy comes here sub salvo conductu, he may maintain an action; so if an alien amy comes here in time of peace per licentiam domini regis, as the French Protestants did, and lives here sub protectione, and a war afterwards happens between the two nations, he may maintain an action, for suing is but a consequential right of protection."

Therefore in order to be able to sue in this country an enemy must not only be here by the licence of the Crown, but he must also be sub protectione domini regis. *Sparenburgh* v. *Bannantyne* (2) shows that a prisoner of war is sub protectione. Alien enemy character for the purpose of all civil rights is to be determined by commercial domicil and not by nationality: *M'Connell* v. *Hector* (3); *Bell* v. *Reid* (4); *Janson* v. *Driefontein Consolidated Mines* (5); *Ingle* v. *Mannheim Insurance Co.* (6); *In re Mary Duchess of Sutherland.* (7)

(1) 1 Ld. Raym. 282; 1 Salk. 46; 1 Lutw. 34.
(2) (1797) 1 Bos. & P. 163.
(3) (1802) 3 Bos. & P. 113.
(4) (1813) 1 M. & S. 726.
(5) [1902] A. C. 484.
(6) [1915] 1 K. B. 227.
(7) (1915) 31 Times L. R. 248, 394.

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The dictum of Low J. in *Rex* v. *Superintendent of Vine Street Police Station, Ex parte Liebmann* (1) to the effect that internment amounts to a revocation of the licence granted by registration is erroneous.

The only case where a person who is in confinement is for that reason unable to sue is under the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), when a person is undergoing a sentence for felony, and even then his right to sue is vested in an administrator. There is no similar statute in regard to imprisonment for misdemeanours, so that if the suggestion were correct that merely by imprisonment a person loses his right to sue, that result would follow by the mere fact of imprisonment for a misdemeanour.

Princess Thurn and Taxis v. *Moffitt* (2) shows that an alien enemy registered under the Aliens Restriction Order, 1914, can maintain an action to assert his individual rights, and a subsequent internment cannot affect that right, since it is merely a further security that the order involved in registration, that the alien shall not leave the country, will be carried out.

A. W. Elkin, for the defendant. The plaintiff being a prisoner of war is not entitled to sue to enforce the agreement in the Courts. *Wells* v. *Williams* (3) shows that his right to sue is dependent upon his having lived in this country under the King's leave and protection "without molesting the Government or being molested by it." By the fact of his internment the plaintiff has been molested by the Government. The effect of internment is different from that of registration. By merely being registered the alien is not "molested" within the meaning of *Wells* v. *Williams*. (3) Molestation takes place when the alien is deprived of his liberty and interned.

It must be assumed that a person is interned upon the ground that he is a danger to the State, and upon that ground he ought not to be assisted by the Courts. Further, the plaintiff cannot enforce a contract entered into before he was a prisoner of war, since a contract made before the war is dissolved when one of the parties becomes a prisoner.

An enemy alien who is not molested is not entitled to sue unless he can show that his presence here, after the commencement of

(1) Ante, p. 268.
(2) [1915] 1 Ch. 58.
(3) 1 Ld. Raym. 282; 1 Salk. 46; 1 Lutw. 34.

hostilities, is known to the Government: *Boulton* v. *Dobree* (1); *Alciator* v. *Smith*. (2) The only effect of the plaintiff having registered himself under the Aliens Restriction Order was that he made his presence known here, and so long as he was not molested it was presumed that he was in protection. But the molestation consequent upon internment rebutted that presumption.

J. B. Matthews, K.C., in reply. In *Wells* v. *Williams* (3) the question of molestation of or by the Government was only referred to in connection with an alien enemy who has come to this country after war is declared. That case has no application to a person in the position of the plaintiff.

Cur. adv. vult.

Sept. 29. The following judgment was read by YOUNGER J.:— This is an action to enforce an agreement of finance between the plaintiff and defendant, and the defendant's preliminary answer to the whole proceeding is that the plaintiff, a German, has since the execution of the agreement been interned as a civilian prisoner of war, and that to him as long as he remains so interned all access to these Courts is denied whether to enforce this agreement or any other private right of his own. He has, so it is said, become exlex (4) during the period of his internment. [Having stated the facts above set out the learned judge continued:]

Now, without expressing for the moment any opinion as to the extent of the relief to which the plaintiff is entitled, I am of opinion that he is at liberty to maintain the action free from any disability attributable to his enemy character. I arrive at this conclusion upon the short ground that the defendant being, as I hold, entitled under the Proclamation to enter into the agreement with the plaintiff, and no change having since taking place in the plaintiff's condition affecting the propriety of the defendant entering into an identical agreement with him even now, the plaintiff must be entitled to enforce in these Courts any rights which the agreement gives him.

(1) (1808) 2 Camp. 163.

(2) (1812) 3 Camp. 245.

(3) 1 Ld. Raym. 282; 1 Salk. 46; 1 Lutw. 34.

(4) [The classical meaning of this word is "outside the law" in the sense of being above it, *legibus solutus*. The present usage occurs from the twelfth century downwards: Du Cange *s.v.*—F. P.]

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The plaintiff has never been, and is not now, an enemy within the meaning of any Proclamation relating to trading with the enemy. No embargo has ever been placed upon the defendant or any other British subject entering with the plaintiff into any transaction otherwise lawful. The internment of the plaintiff has in no way affected any right which the defendant otherwise had to contract with the plaintiff, although it may have restricted his opportunities for so doing. Internment has not made the plaintiff an enemy. Enemy character in a trading sense has never attached to him. The views on these points set up on behalf of the defendant before action commenced cannot, I think, be supported. But I know it has been suggested that while the Proclamation may, under certain conditions of residence, authorize, in the sense that it does not prohibit, transactions with a person who may be an enemy alien born, still it has not the effect of rendering the King's Courts accessible to such an alien for the purpose of enforcing such transactions unless he can on some other ground claim the right to sue, and I am aware that that view has been taken by a sheriff court in Scotland, that it has been supported by at least one text-writer of eminence here, and, as applied to enemy aliens resident and carrying on business in Germany but with a branch here, that the right of these enemies in the full sense to sue during the continuance of the war in respect of a transaction with that branch since its commencement has been expressly left by the Court of Appeal to be decided when the case arises. But no Court of Appeal or of co-ordinate jurisdiction has, so far as I am aware, ever held that an enemy alien not resident in enemy territory is prevented from enforcing in these Courts any claim competent to him in respect of a transaction since the war not prohibited by the Proclamation, and it would in my judgment be not only subversive of principle so to hold, but it would be contrary to such authority as there is to be found on the subject.

Lord Coke, speaking of a time when an enemy alien born could not in any circumstances maintain in the Courts of this country either a real or a personal action, and when no alien, whether friend or enemy, could hold land here, says of an alien friend: "An alien that is in league shall maintain personal actions; for an alien may trade and traffic, buy and sell, and therefore of necessity he must

be of ability to have personal actions, but he cannot maintain either real or mixed actions." See Co. Litt. i. 129b.

Applying that principle to the present case, the plaintiff here must of necessity have access to the Courts to enforce the rights which, while still in the same case, he was permitted to acquire, and the same principle will be found further illustrated by the passage in Bacon's Abridgment, vol. i. (1832 ed.) p. 183, tit. "Aliens," where the right to sue is said to be consequential on the right of protection.

Indeed, if this were not so, the Proclamation would be little better than a mockery to a person in the position of the plaintiff. It would leave him liable to fulfil all his permitted transactions but powerless to enforce any of them, and such a result would not only be ruinous to the plaintiff, but speedily disastrous to all persons contracting with him, and it was on this very ground that an alien executor under the old law was permitted to sue, for it was said that, if he were not, it would be a prejudice to the King's subjects, who could not recover their debts from him if he were not able to get in the assets of his testator. See Bacon's Abridgment, vol. i. (1832 ed.), p. 181.

And there is recent judicial authority for this view. In *Mary Duchess of Sutherland's Case* (1) Warrington J. held that an enemy alien could maintain an action here who was neither residing nor carrying on business in an enemy country, but was residing either in an allied or neutral country, and was carrying on business through his partners in that allied country. The case went to the Court of Appeal (2), and, there being some doubt as to the facts, the Court of Appeal thought it better that the question should be reserved till the trial, but they did not express any disagreement with the learned judge's statement of the law.

And if an enemy alien resident in a neutral country can maintain such an action in these Courts it would appear a fortiori that if resident, and even more if interned here, he can equally maintain it. For it must always be remembered when dealing with this subject that it is not the nationality of the plaintiff but his place of business during war that is important. It is when he is resident in hostile territory that payment of money to him is, in the view of the Court,

(1) 31 Times L. R. 248. (2) 31 Times L. R. 394.

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to the advantage of the enemy. In a case like the present, where the plaintiff is effectually prevented from leaving this country, there is no reason of State or public policy why the principle just alluded to should not be given full effect.

The case would be quite different if the plaintiff were to remove to enemy territory. He would then become an enemy in the full sense, no longer able, for the duration of the war, to enforce his civil rights or sue or proceed in the civil Courts of the realm, and this disability may well explain why in the case of *Wolf & Sons* v. *Carr, Parker & Co.* (1) the Court of Appeal refrained from deciding whether even authorized transactions with a branch of an enemy firm could during the war be enforced in these Courts by the partners of the firm resident and carrying on business in enemy country.

In my opinion, therefore, the plaintiff is entitled to maintain this action, and I might, especially in vacation, be content to leave the case there. But very able arguments as to an interned alien enemy's right to sue, apart from any question arising under the Proclamation, were addressed to me by counsel on both sides, and it is due to these arguments as well as to the importance of the principle involved, having regard to the number of enemy aliens now interned in this country, that I should, before parting with the case, deal with the grounds on which the contentions of the plaintiff and the defendant were respectively rested. Both sides were content to treat the case of *Wells* v. *Williams* (2) as being the basis of the modern law on the subject, and, founding upon that case, Mr. Matthews, for the plaintiff, contended that all that was necessary to his client's right to sue was that he should be here "in protection"; and he said that the plaintiff was here in protection and known to the King to be so, not only because he had been registered as an enemy alien, but also because he had been subsequently interned as such; that in this country, as in the United States (see *Clarke* v. *Morey* (3)), licence and protection would be implied from his being suffered to remain without being ordered out of the country, and that his right to sue was certainly not less clear than that of an alien enemy resident and carrying on business in a neutral or friendly country.

(1) [1915] W. N. 195.

(2) 1 Ld. Raym. 282; 1 Salk. 46; 1 Lutw. 34.

(3) (1813) 10 Johnson, Sup. Ct. New York, 69.

See *In re Mary Duchess of Sutherland.* (1) Mr. Elkin, for the defendant, on the other hand, contended that the right of action recognized in *Wells* v. *Williams* (2) was, as stated in the report of the case in Lord Raymond, conditioned on the plaintiff's being here "without molesting the Government or being molested by it"; that internment was molestation by the Government which put an end to the plaintiff's right to sue; that, if not, then internment was a revocation of any licence to remain implied in the registration; and that in any case no prisoner of war, and such the plaintiff is, could maintain any action in these Courts while still a prisoner.

Now, in my judgment it is the view of the plaintiff as stated above which is right and ought to prevail. There has been a gradual and progressive modification in the rules of the old law in their restraint and discouragement of aliens. It is, as I have already indicated, not the nationality, but the residence and business domicil of the plaintiff that are now all-important. If these are in enemy country a plaintiff may not sue, whatever his nationality, even if he be a friend. If these are in friendly or neutral territory he may sue, even if he be an enemy born. Prima facie all persons resident in this country are entitled to have access to the Courts, and, although it may still be that an alien enemy plaintiff resident here must also show that he is here with the licence, actual or implied, of the King, still even so, as has been held by Sargant J. in *Princess Thurn and Taxis* v. *Moffitt* (3), the registration which the plaintiff has effected is sufficient evidence of such a licence. And it may be that the expression being "in protection" means little more than the consequence to the plaintiff of his being licensed to remain. If, however, it does mean more, then it has been expressly decided that a prisoner of war is here under the protection of the King (*Sparenburgh* v. *Bannatyne* (4)), so that the plaintiff's position appears to be complete.

And it is not, in my judgment, displaced by any of the defendant's contentions.

Apart from the difficulty of determining what the words "without being molested by the Government" mean, it is very remarkable

(1) 31 Times L. R. 248, 394.
(2) 1 Ld. Raym. 282; 1 Salk. 46; 1 Lutw. 34.
(3) [1915] 1 Ch. 58.
(4) 1 Bos. & P. 163, 170, per Heath J.

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that no such qualification upon the generality of the rule is to be found in the report of *Wells* v. *Williams* in Salkeld (1) or in the statement of the law in Bacon's Abridgment sub tit. "Aliens," obviously based on this case. Moreover, the qualification, whatever it may mean, appears to be limited to alien enemies who come here after the outbreak of war, and that the plaintiff did not do. But, further, if internment be a molestation by the Government, then the same must be said of compulsory registration and the restrictions upon the movements of enemy aliens imposed by the terms of the Restriction Order, which, indeed, amount to little less than internment in another form. But *Princess Thurn and Taxis* v. *Moffitt* (2) shows that a registered alien enemy is entitled to sue.

And lastly I can find no real warrant for the contention that internment is equivalent to a revocation of the licence to remain which is implied in registration. It is true that an opinion to that effect was expressed by Low J. in the recent case of *Rex* v. *Superintendent of Vine Street Police Station, Ex parte Liebmann* (3), and if I had thought that the learned judge had intended to decide the general question I should have willingly followed his decision whatever my own opinion might have been as to the result when applied to the facts of this case. But I am satisfied that the learned judge had no such intention. He was dealing, and he was dealing only, with the right of an interned prisoner of war to sue out a writ of habeas corpus, and in my view he decided, and he intended to decide, no more than this, that internment was a revocation of the former licence to the extent that the alien was no longer left at large subject to restrictions, but there was no decision that internment was a revocation of any licence to remain in this country.

As a matter of fact it cannot well be so regarded. The appropriate revocation of a licence to remain here would be some intimation, express or implied, that the alien must perforce depart, not an arrest, by which he is effectively prevented from going away. And when Sargant J.'s observation in *Princess Thurn and Taxis* v. *Moffitt* (2) is recalled that the permission to remain really amounts to a command to the alien enemy not to depart from this country without some special leave for the purpose, it becomes more

(1) 1 Salk. 46.

(2) [1915] 1 Ch. 58.

(3) Ante, p. 268.

than ever clear that internment is merely a further security that that command will be obeyed. And finding no precedent in support of the defendant's contention on this point, I am not disposed to make one; for the contention is based on no kind of principle. If there be at any time any possibility of danger to the State in allowing an alien enemy to sue it is surely least to be apprehended when the alien is safely interned. It would indeed be strange that the alien might sue when possessed of all the opportunity for doing mischief which either residence in a neutral country or a certain amount of freedom in this country afforded, but was to be deprived of the privilege when kept here in strict confinement. In short the disability could only be justified on some theory that internment operated as a sort of corruption of the blood, a consideration which brings me to the defendant's last point, that the plaintiff is not entitled to sue because he is, and so long as he remains, a prisoner of war.

Now it is true that in a very real sense the plaintiff is a prisoner of war: see *Rex* v. *Superintendent of Vine Street Police Station, Ex parte Liebmann* (4); but it would indeed be strange if that circumstance, without more, were to have the extraordinary effect upon his rights which is attributed to it.

It is common knowledge amongst us that the internment of a civilian alien enemy does not necessarily connote any overt hostile attitude on his part. Many such aliens have been interned at their own request and for their own protection; many others profess the strongest desire to become and many more have applied to be naturalized British subjects. And these professions may be, and in very many cases they doubtless are, quite sincere; the only justification in such cases for internment is that the State cannot take the risk that they are not. But what is perfectly certain is that there is no necessary line of demarcation between the attitude towards this country of an alien who has been interned as contrasted with one who has not; and yet only the interned are prisoners of war. Unless, therefore, some authority can be produced to show that internment by itself makes an alien exlex, nothing can, as it seems to me, be made of this defence.

I have not to consider whether the defence might apply to the

(1) Ante, p. 268.

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case of one taken prisoner on the field of battle or to any actual combatant. It is, however, I think certain that it cannot, without more, apply to a civilian interned as a mere measure of police—a proceeding connoting no proof of hostile act or intent. On principle, therefore, I see no reason why the right of suit which on the authority of *Princess Thurn and Taxis* v. *Moffitt* (1), approved by the Court of Appeal in *Porter* v. *Freudenberg* (2), the plaintiff possessed immediately before his internment has been taken away by that event. Indeed, such a case as *Sparenburgh* v. *Bannatyne* (3)—see also the argument in *Maria* v. *Hall* (4)—seems to indicate that his right in that respect is if anything thereby strengthened rather than prejudiced. Such special cases as *Anthon* v. *Fisher* (5)—an action upon a ransom bill—do not affect the general statement. The defence of alien enemy is not favoured by the Courts. Lord Kenyon C.J. so long ago as 1799 observed that it was an odious plea: *Casseres* v. *Bell* (6); and it is to me a satisfaction to find that I am not required by any principle or authority to refuse to an interned civilian prisoner of war in respect of a right which he has lawfully acquired access to these Courts under circumstances which in no way involve the safety of the State or the benefit of the enemy.

I am therefore prepared to declare that the contract between the plaintiff and the defendant is not affected by the fact that the plaintiff is now interned within the realm as a civilian prisoner of war, and that the plaintiff is entitled to maintain any action otherwise competent to him in respect thereof.

J. E. A.

The defendant appealed.

A. W. Elkin, for the appellant. The internment of the plaintiff under the Aliens Restriction Order so affected his status as to deprive him of the right to sue in the Courts of this country: *Reg.* v. *Schiever* (7); *Furly* v. *Newnham* (8); *The Three Spanish Sailors Case.* (9) Those authorities go to show that a prisoner of war has no rights under the law of this country, and that a writ of habeas

(1) [1915] 1 Ch. 58.
(2) [1915] 1 K. B. 857.
(3) 1 Bos. & P. 163.
(4) (1800) 1 Taunt. 33.
(5) (1782) 3 Doug. 166, 178.
(6) (1799) 8 T. R. 166.
(7) (1759) 2 Burr. 765.
(8) (1780) 2 Doug. 419.
(9) (1779) 2 W. Bl. 1324.

corpus will not issue in his case. He is not entitled to any of the privileges of an Englishman: see also *Rex* v. *Superintendent of Vine Street Police Station, Ex parte Liebmann* (1), where it was held that the notice of internment given by the authority of the Secretary of State is a sufficient revocation of the licence implied by registration under the Aliens Restriction Order.

[BANKES L.J. Your argument must go to this, that the goods of an interned person are to go to the first comer.]

It does not go so far as that. He is in the same position as an alien enemy.

[BANKES L.J. Has it ever been decided that an actual combatant taken prisoner of war has no civil rights?]

No prisoner of war alien enemy has ever been held to have civil rights, though a prisoner of war who is not an alien enemy by birth, but has acquired a temporary character of alien enemy, may maintain an action: *Sparenburgh* v. *Bannatyne.* (2) The Court will grant relief if a man is only temporarily an alien enemy although a prisoner of war. But see *Maria* v. *Hall* (3), where the point was argued but no judgment was ever given. In order to have a right to sue an alien enemy must not only be here by the King's leave and protection, but he must neither have molested the Crown nor been molested by the Crown: *Wells* v. *Williams.* (4) It is true that in the report of the same case in 1 Salkeld, 46, that statement of the law does not appear, but there is no reason to doubt the correctness of the report in Lord Raymond.

[LORD COZENS-HARDY M.R. That case was discussed by the full Court of Appeal in *Porter* v. *Freudenberg.* (5)]

The point in that case and in *Princess Thurn and Taxis* v. *Moffitt* (6) was that by registration the alien enemy had made known his presence to the King, and that that implied a licence by the Crown to remain here. But there are two conditions attached to that implied licence: (1.) his presence must be known to the King; and (2.) there must be no physical restraint upon his person—he must not be molested by the Crown. Internment amounts to molestation. When an alien enemy is molested he

(1) Ante, p. 268.
(2) 1 Bos. & P. 163.
(3) 1 Taunt. 33.
(4) 1 Ld. Raym. 282, 283.
(5) [1915] 1 K. B. 857.
(6) [1915] 1 Ch. 58.

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is put out of protection: *Boulton* v. *Dobree* (1); *Alciator* v. *Smith.* (2)

The Act of 43 Geo. 3, c. 155, has no doubt expired, but s. 18, which provides "That in case His Majesty shall be advised that it may be dangerous to the security of the kingdom to send any alien out of the kingdom, it shall be lawful for His Majesty . . . . to order such alien to be detained in custody in this kingdom, ..." shows that by internment the alien is put out of protection. That is what has been done here. A licence to the plaintiff to remain commorant in this country is no doubt implied from his registration: *Porter* v. *Freudenberg* (3); but the effect of internment is to revoke that licence. His right to sue is conditional upon his being here without molestation by the Government. Internment is molestation and puts an end to his right to have recourse to the Courts of this country. Internment cannot increase his rights, but rather operates to cut them down.

J. B. Matthews, K.C., and *S. Duncan*, for the respondent, were not called upon.

LORD COZENS-HARDY M.R. This is an appeal from the judgment of Younger J., and it raises a point which is undoubtedly of importance; but I feel that really the most satisfactory way of dealing with the case would be to say that I agree with the judgment of Younger J. and for the same reasons.

The facts are these. The plaintiff was a German by birth and had been resident in this country for twenty-two years, and had carried on business here during that time. Immediately after the outbreak of war he registered himself under the provisions in force for the registration of aliens, and this operated as a licence to remain in the country, and carried with it the right to trade and enter into agreements with British subjects. The agreement in question here was entered into in March, 1915, and there is nothing in the agreement itself to lend colour to the suggestion that it was otherwise than perfectly free from objection. A considerable sum of money is admittedly due from the defendant to the plaintiff under that agreement. The plaintiff was interned in July of this year, and the

(1) 2 Camp. 163. (2) 3 Camp. 245.
(3) [1915] 1 K. B. 857.

writ in this action was issued on September 7. The only point that has been tried is whether the plaintiff can take any proceedings having regard to his internment—in other words, whether he is exlex and has no locus standi in the Courts, so that the action ought to be dismissed. Younger J. made a declaration that the contract between the plaintiff and the defendant was not affected by the plaintiff's internment, and that the plaintiff was entitled to sue upon the contract and maintain an action. From that decision this appeal is brought

I think one must be very careful in deciding the case neither expressly nor by reasonable implication to say anything inconsistent with the judgment of the full Court of Appeal in the case of *Porter* v. *Freudenberg* (1) delivered by Lord Reading, but delivered by him after the most elaborate discussion with all the other members of the Court. What did that case decide ? It decided that for the purpose of trading it is not a person's nationality that determines whether he is an "alien enemy." That is not the test. It decided also, approving Sargant J.'s judgment in *Princess Thurn and Taxis* v. *Moffitt* (2), that registration operated as a licence by the Crown to the registered person to remain commorant here. It did not decide, nor could the Court have reasonably been asked to decide, that such a licence could not be revoked by the Crown. But there is no circumstance here which can be suggested for one moment as affording evidence of revocation unless it be the internment which took place in July of this year. We have been taken back to a number of authorities, most of which were referred to and discussed in *Porter* v. *Freudenberg* (1), the case heard before the full Court of Appeal. I do not intend to go back on anything that was said there, but there is one point at least in this case which may be taken to be a new point, and it is this. It is said that though it is true that registration has the effect of a permission from the Crown to remain in this country, that permission only lasts so long as the licensee does not molest the Crown and is not molested by it ; and it is further said that the plaintiff is plainly molested by being kept in confinement in the Isle of Man under the internment Order. I think there is absolutely no authority for that proposition. One authority relied upon was the case of

(1) [1915] 1 K. B. 857. (2) [1915] 1 Ch. 58.

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Wells v. *Williams* (1), and reliance was placed on one passage only. The judge presiding in the Court said this: "Though the plaintiff came here since the war, yet if he has continued here by the King's leave and protection ever since, without molesting the Government or being molested by it, he may be allowed to sue, for that is consequent on his being in protection." What is the meaning of those words "being molested by the Crown"? I think they mean only this, that if it be shown that, although the licence was given by the Crown, that licence was subsequently withdrawn by the Crown, that is a molestation, which would prevent, or might prevent, the plaintiff from suing. I do not rely solely upon that construction of these words, because the case is reported more than once. In the report in Salkeld the words which I have read about molesting the Government, or being molested by the Government, are not to be found. The judgment is very short, and I will read the material portion of it: "If an alien enemy comes hither sub salvo conductu, he may maintain an action: if an alien enemy comes hither in time of peace, per licentiam domini regis, as the French Protestants did, and lives here sub protectione, and a war afterwards begins between the two nations, he may maintain an action; for suing is but a consequential right of protection." That judgment seems to me to put the case of *Wells* v. *Williams* (1) on a perfectly satisfactory foundation, and I entirely decline to assume that such an important proposition as the appellant here relies upon can be established upon a single sentence in a short judgment in Lord Raymond's reports. The observation in question seems to me to be wholly irrelevant, and, if I may respectfully say so, either it must be wrong, or else "molesting" refers to the revocation by the Crown under its prerogative of the licence to remain in this country.

Then it is said that there is no authority at all which supports the contention in this case, and there is authority against it, and we have been referred to three old cases which have laid down the proposition, which I do not for a moment question, that a writ of habeas corpus cannot be taken out by a prisoner of war, and also to the very recent case in the Divisional Court of *Rex* v. *Superintendent of Vine Street Police Station, Ex parte Liebmann* (2), in

(1) 1 Ld. Raym. 283; 1 Salk. 46. (2) Ante, p. 268.

which it was held that an interned prisoner was equally unable to apply for a writ of habeas corpus. That is all that that case decided, and the decision seems to me, if I may respectfully say so, to be perfectly right; but, speaking for myself only, I desire not to be held to accept in its entirety the language used by the two learned judges, Bailhache J. and Low J. It is sought to treat those observations as a decision that an interned German in the circumstances in which the plaintiff finds himself is for the purpose of enforcing civil rights to be treated as a prisoner of war in the same way as if he had been captured in a German ship, or at some point in Flanders or elsewhere. Any such decision would, I think, be an extension of the law which I cannot in any way countenance. But I do not think that the case is really so bare of authority as was suggested. One of the cases to which our attention has been properly called is that of *Sparenburgh* v. *Bannatyne*. (1) In that case the question was whether a German taken on a Dutch privateer vessel which was properly captured by the British Government could whilst a prisoner of war bring an action for wages due. The Court, consisting of Eyre C.J., Heath J., and Rooke J., dealt with it in observations which seem to me to be very helpful. Eyre C.J. says: "But a neutral, whether in or out of prison, cannot, for that reason, be an alien enemy; he can be an alien enemy only with respect to what he is doing under a local or temporary allegiance to a Power at war with us. When the allegiance determines, the character determines. He can have no fixed character of alien enemy who owes no fixed allegiance to our enemy, and has ceased to be in hostility against us: it being only in respect of his being in a state of actual hostility that he was even for a time an enemy at all. As a prisoner of war, how does he differ from any other individual who is in custody for an offence which he has committed, and for which he is answerable"? A prisoner who may be committed to prison for an offence is not exlex—he is entitled to assert his civil rights; and it is not right to say in this case that the plaintiff, although his personal liberty is curtailed by the internment Order, as it was, though to a less extent, by the Order under the Aliens Restriction Act, has lost all power of enforcing his rights in respect

(1) 1 Bos. & P. 163, 168.

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of the trade which he has been carrying on without any possibility of complaint since the agreement entered into by him in March of this year. But the matter does not rest there. Heath J. says this (1): "Next as to the general question, the pleas state that the plaintiff was adhering to the King's enemies; that must be proved in all their parts; but a prisoner at war is not adhering to the King's enemies, for he is here under protection of the King. If he conspires against the life of the King it is high treason; if he is killed, it is murder; he does not therefore stand in the same situation as when in a state of actual hostility. It has been said, that a prisoner at war cannot contract; his case would be hard indeed if that were true" — which I think must be taken to mean that he can contract and can assert his rights under the contract. Then lower down Heath J. says: "The contract in question was made by the permission of the King's officer, and therefore by the licence of the King, under whose authority the officer may be presumed to have acted." Rooke J. says the same thing (2): "An enemy under the King's protection may sue and be sued: that cannot be doubted. A prisoner at war is for certain purposes under the King's protection, and there are many cases where he can maintain an action. I will suppose that an officer of high rank on his parole is possessed of a ring or jewel of great value, on which he wants to raise money, and that a tradesman is so dishonest as to receive it from him, and refuse either to advance the money or return the pledge. Surely the Court would say that he might recover his ring or his jewel from the tradesman." If authority be wanted in support of the view I take I think it is to be found in the case of *Sparenburgh* v. *Bannatyne*. (3) But I do not base my judgment upon that case alone. It seems to me to be in accordance with general principles, and only in accordance with general principles, that the restraint which is imposed upon the personal movements of an interned German does not deprive him of civil rights in respect of a lawful contract entered into by him before the internment.

For these reasons I think the appeal fails and must be dismissed with costs.

(1) 1 Bos. & P. 170. (2) Ibid. 171.
(3) 1 Bos. & P. 163.

BANKES L.J. I quite agree. The appellant's argument, as I understand it, is founded upon the fact that this plaintiff is both an alien enemy and a prisoner of war, and it seems to be suggested that because he is both of those he cannot be in the same position as if he were only an alien enemy, or only a prisoner of war. I do not agree with that proposition at all. This man's position as alien enemy is quite clear upon the authorities. Upon the authority of *Princess Thurn and Taxis* v. *Moffitt* (1) and *Porter* v. *Freudenberg* (2) the plaintiff is in protection and he is entitled to enforce any civil rights he may have in the Courts of this country. As a prisoner of war his position upon the authorities is quite clear. He is in no worse position than any other individual who is in custody for an offence. Therefore, in whatever way his position is considered, he is entitled, upon the authorities, to maintain an action. But it is said that there is authority for the proposition that a person who, to use the language of the appellant's counsel, is either molesting the Government or being molested by the Government is in some position different from that of an alien enemy such as this man was or a prisoner of war. In my view there is no authority for that proposition at all. The only case in which those words are used in any judgment of the Court is, as far as I can remember, the case of *Wells* v. *Williams* (3), as reported in Lord Raymond's reports, and as there reported it seems to me that the reference to molestation is a reference to something that may be evidence of a licence, if it had been given, having been withdrawn, or there having been no licence at all. It is not a reference to some separate condition, apart from the condition of alien enemy or prisoner of war, which would disentitle a plaintiff to enforce any civil rights he might have in a Court of law.

On these grounds I agree with the judgment of the Court below and with the judgment delivered by the Master of the Rolls.

WARRINGTON L.J. The defendant here asserts that the plaintiff is for the time deprived of all civil rights, including particularly the right to institute and maintain an action in these Courts. The plaintiff was a native of Germany. On the outbreak of war he duly

(1) [1915] 1 Ch. 58. (2) [1915] 1 K. B. 857.
(3) 1 Ld. Raym. 282.

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complied with the Aliens Restriction Order and registered himself. The result of that was that he had the right to enter into any otherwise lawful contract and the right to resort to these Courts for the purpose of enforcing his rights either under a contract made after the commencement of the war or under a contract made before the commencement of the war. On July 1, 1915, he was interned—that is to say, the King, in the exercise of his right and duty in defence of the realm, thought it desirable for that purpose that this person should no longer be at large. It is said that from that moment so long as he remains interned he loses all his civil rights. That must mean that the first man who came along might go and live in his house and, provided he kept outside the criminal law, might take possession of his property and deal with it as he pleased and the Courts of this country could not interfere. It seems to me that such a proposition carries its own answer with it. It is so extravagant that it cannot possibly be the law of this country in these times. Now, is it capable of being supported by any authority? In my opinion clearly not. The right of an alien of enemy birth to sue in this country is derived from the fact that he is resident here under a licence from the Crown. Under a licence to do what? Simply to remain in this country. That is the only licence that is material. Can it be that a licence to remain in this country is recalled by an act of the Crown which compels him to remain in this country? It seems to me again that one has only to state the proposition to see that it cannot possibly be so. In my judgment, notwithstanding the internment, the licence to remain in the country which carries with it the right to prosecute an action in the Courts of this country must remain in force. I have said this because we have been referred to the recent case of *Rex* v. *Superintendent of Vine Street Police Station, Ex parte Liebmann* (1), before Bailhache J. and Low J., in which the only question the Court had to determine was whether an interned alien was entitled to sue out a writ of habeas corpus—a very different question. The decision of the Court was that an interned alien had no right by means of a writ of habeas corpus to question the authority of the Crown so to intern him. There was no necessity in that case to decide any

(1) Ante, p. 268.

further question, and I desire to express, as far as I am personally concerned, my disagreement, as at present advised at all events, with the statement made in the judgment of Low J. that in his opinion there was little doubt that it might be successfully contended that notice of internment is a sufficient revocation of the licence, the licence there referred to being the licence to remain in this country. I cannot agree with that, and I thought it desirable, therefore, that I should say so although the judgment in itself imports a disagreement with that proposition.

The authorities that have been cited to us with regard to prisoners of war in old times only go to this, that the prisoner of war could not sue out a writ of habeas corpus. Of course nobody now disputes that. There is no case which goes so far as the proposition contended for by the defendant in the present case, and in my judgment *Sparenburgh* v. *Bannatyne* (1) is a distinct authority to the contrary.

Appeal dismissed.

Solicitors: *A. De Frece & Co.* ; *Humphreys, Phillips & Co.*

(1) 1 Bos. & P. 163.

G. A. S.

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1915

Nov. 29, 30.

[IN THE COURT OF APPEAL.]

UNDERGROUND ELECTRIC RAILWAYS COMPANY OF LONDON, LIMITED AND GLYN, MILLS, CURRIE & CO. *v.* THE COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Bond, Covenant, or Instrument—Money payable on Contingency—Annuity—Half-yearly Payments—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *Sched. I.*

By a deed executed by them the Underground Company agreed, provided a sufficient number of the holders of ordinary stock of the Central London Railway Company would take guaranteed stock in exchange for their ordinary stock, to guarantee interest at 4 per cent. per annum on such guaranteed stock, payable half-yearly, if and to the extent that the profits of the Central London Railway Company were not sufficient to pay that amount of interest. At the date of the deed it was not known whether a sufficient number of holders of ordinary stock would accede to the arrangement or whether all would so accede, but if they all acceded and if the Central London Railway Company made no profits in any year, the appellants would be liable to pay 120,000*l.* in that year, being 4 per cent. on 3,000,000*l.* stock :—

Held, (1.) that the deed was chargeable with ad valorem stamp duty under the heading "Bond, Covenant, or Instrument of any kind whatsoever, being the only or principal or primary security for any annuity . . . . or for any sum or sums of money at stated periods . . . . for . . . . [an] indefinite period," on the maximum sum which might become payable under the deed ; and (2.) that the amount on which the duty was chargeable was the yearly sum that might be payable, namely, 120,000*l.*, notwithstanding that it was payable at half-yearly periods.

Decision of Scrutton J. [1914] 3 K. B. 210 affirmed.

APPEAL from a decision of Scrutton J. (1)

Case stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891.

1. On January 9, 1913, an instrument was presented on behalf of the Underground Electric Railways Company of London, Limited, and Glyn, Mills, Currie & Co. (hereinafter called the appellants) to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable.

(1) [1914] 3 K. B. 210.

2. The instrument in question was an indenture made between the Underground Electric Railways Company of London, Limited, (thereinafter called the "Underground Company") of the one part and Glyn, Mills, Currie & Co. (thereinafter called "the trustees") of the other part, and was duly executed by the parties thereto under their respective seals on December 13, 1912.

3. The question of stamp duty, which was in dispute, arose mainly on clauses 2, 5, and 6 of the instrument, and the gist of the arrangement of which that formed a part was, shortly, as stated in the following paragraph.

4. The Central London Railway Company had issued 3,000,000*l.* ordinary stock, of which 1,707,586*l.* was undivided ordinary stock, 646,207*l.* was preferred ordinary stock, and 646,207*l.* was deferred ordinary stock. These stocks are together referred to as the "railway stocks." By clause 2 of the instrument in question, as and when from time to time before a date thereby fixed any railway stock should have been transferred to and registered in the names of Messrs. Glyn, Mills, Currie & Co., parties to the instrument (therein and hereinafter called "the trustees"), the trustees were to enter in the register to be kept by them under such instrument the names of the transferors of such railway stock as the holders of stocks issued under such instrument, which stocks for the time being issued under the instrument and outstanding are referred to as "the guaranteed stocks," but unless before the fixed date the holders of at least a certain percentage referred to in the instrument of the railway stocks had deposited with the trustees their undertakings in writing to the Underground Company to transfer their holdings of the railway stocks, accompanied by the stock certificates therefor, the Underground Company could declare that the trust created by the instrument had failed.

Clause 5 was as follows: "The trustees shall apply the income of the railway stocks received by them in respect of each half year from January 1, 1913, in manner following, that is to say:—

"(i.) First in or towards payment to the guaranteed stockholders (pari passu and in proportion to the respective nominal amounts of the guaranteed ordinary stock, the guaranteed preferred stock and/or the guaranteed deferred stock held by them respectively) without distinction between the stocks of

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the said several classes of dividends for such half year on such guaranteed ordinary stock, guaranteed preferred stock and guaranteed deferred stock at the rate of 4 per cent. per annum.

"(ii.) Secondly, the surplus (if any) of the income of the railway stocks received by the trustees in respect of each half year remaining after payment of the dividends payable thereout for such half year under the last preceding sub-clause shall be paid to the Underground Company subject nevertheless to the provisions of the next following sub-clause.

"(iii.) If and when the dividend received by the trustees on the railway stocks (taken together) for three successive years (all being subsequent to the year ending December 31, 1912) shall on the average of such three years have exceeded 4 per cent. per annum on the nominal amount of such stocks (taken together) then whenever the dividend received by the trustees on the railway stocks for any year subsequent to the happening of such event shall exceed 4 per cent. on the nominal amount of such stocks (taken together) 40 per cent. of such last-mentioned excess shall be applied by the trustees in paying a further dividend for such year on the guaranteed ordinary stock, the guaranteed preferred stock and the guaranteed deferred stock pari passu and in proportion to the respective nominal amounts thereof.

"The dividends at the rate of 4 per cent. per annum for the time being payable under this deed on the guaranteed stocks shall be payable half yearly on the last day of February or August (as the case may be) next after the end of each half year. Any additional dividend under sub-clause (iii.) of this clause shall be payable on the last day of February next after the end of the year in respect of which it is payable."

Clause 6 was as follows: "Subject to the provisions of this deed the Underground Company hereby guarantees that the dividends paid on the guaranteed stocks in respect of each half year under the last preceding clause hereof shall be at the rate (hereinafter called 'the guaranteed rate') of 4 per cent. per annum and accordingly if and so often as the income of the railway stocks received by the trustees within seven weeks next after the expiration of any half year in respect of such half year shall not be sufficient

for the payment of dividends on the guaranteed stocks for such half year at the guaranteed rate the Underground Company will forthwith pay to the trustees such a sum as with the income (if any) of the railway stocks for such half year will enable the trustees to pay on the dates hereby appointed for the payment thereof the dividend for such half year on the whole of the guaranteed stocks at the guaranteed rate. The Underground Company shall be entitled to be refunded any payment made by it under this clause out of the income (if any) of the railway stock which subsequently to such payment being made is received by the trustees in respect of the half year to which such payment relates."

A circular dated December 14, 1912, was on or shortly after that date sent out by the Central London Railway Company to all its stockholders. This circular outlined the instrument of December 13, 1912, and stated that if the stockholders wished to make the exchange they should sign the form enclosed in the circular and deposit same with their stock certificates not later than December 31, 1912, with Messrs. Glyn, Mills, Currie & Co. At the date of the instrument it could not be stated whether a sufficient number of holders of railway stocks would accede to the arrangement within clause 2 of the instrument, or whether all would so accede, and in fact at that date none had acceded. It was admitted that if they all acceded (which the Underground Company stated they had not done) 3,000,000*l.* of railway stocks would be so transferred and 3,000,000*l.* of guaranteed stocks would be issuable to the transferors of the railway stocks, and that in this event, and if the Central London Railway Company paid no dividends, sums (amounting as a maximum to 120,000*l.* a year, namely, 4 per cent. on 3,000,000*l.* guaranteed stock) would become payable under clause 6 by the Underground Company for an indefinite period.

5. The Commissioners assessed the instrument to a duty of 10*s.*, to which no objection was taken, and also to a duty of 3000*l.* The former duty was assessed by reference to the heading in Sched I. of the Stamp Act, 1891, "Deed of any kind whatsoever not described in this Schedule," and the latter duty was assessed by reference to the heading in Sched. I. of the Stamp Act, 1891, "Bond, Covenant, or Instrument of any kind whatsoever being the only or principal or primary security for any annuity . . . .

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or for any sum or sums of money at stated periods . . . . for [an] indefinite period."

6. The appellants being dissatisfied with the assessment required this case to be stated.

7. The questions for the opinion of the Court were whether the instrument, in addition to the duty of 10*s*., (1.) was chargeable with the duty of 3000*l*., or, if not, (2.) was chargeable with any and what additional duty.

Scrutton J. affirmed the assessment of the Commissioners, and the Underground Company and the trustees appealed.

Roskill, K.C., and *Austen-Cartmell*, for the appellants. This instrument does not come within the words of the schedule to the Stamp Act, 1891, "Bond, Covenant, or Instrument of any kind whatsoever—1. Being the only or principal or primary security for any annuity . . . . or for any sum or sums of money at stated periods . . . . for the term of life or any other indefinite period . . . ." because at its date there was no definite ascertained sum that might become payable thereunder. There has been no decision that these words apply to an instrument under which money is only payable on a contingency, although there have been such decisions on other sections. Thus on s. 56, sub-s. 2, of the Stamp Act, 1891, which relates to conveyances on sale, it was held in *Underground Electric Railways Co. of London* v. *Inland Revenue Commissioners* (1) that money though payable on a contingency or more than one contingency was money payable periodically, and therefore was chargeable with ad valorem duty. But in that case, as was pointed out by Collins M.R. in the Court of Appeal, a definite sum was ascertained at the date of the instrument there in question which might become payable thereunder. The Crown there claimed stamp duty on the minimum amount that might be payable, whereas, if they are right in their present contention, they ought to have claimed duty on the maximum amount that might become payable. This deed was not a security at all at the date when it was executed.

In *Mortimore* v. *Inland Revenue Commissioners* (2) the words "mortgage debt or sum of money" were held to include contingent

(1) [1905] 1 K. B. 174; [1906] A. C. 21. (2) (1864) 2 H. & C. 838.

as well as absolute debts, but there a definite sum was secured by the instrument in question although it was only payable on a contingency. In the present case there was no debt existing at the date of the instrument, which for this purpose is the material date: *West London Syndicate* v. *Inland Revenue Commissioners.* (1)

An obligation to pay must be created by the instrument itself, and the nature and amount of the obligation must be certain at the date of the instrument even though it is only contingently payable. There must be definite correlative obligations: *Onslow* v. *Inland Revenue Commissioners.* (2) Here it was impossible to know whether the deed would ever ripen into a security. Nobody could sue on it: *City of London Brewery Co.* v. *Inland Revenue Commissioners.* (3) It is said that this is a conveyance and the minimum liability is fixed, and *Maxwell* v. *Inland Revenue Commissioners* (4) is relied on, but in that case there was a bond for a definite sum, and there were correlative obligations. In the section relating to mortgages—s. 86 of the Stamp Act—"mortgage" is defined as "a security by way of mortgage" for the payment of any "definite and certain sum of money," those words referring to certainty of the sum secured by the instrument and not to certainty of payment; and on that section or the corresponding sections of the previous Stamp Acts it was held in *Lord Canning* v. *Raper* (5) that an assignment of chattels to secure to the assignee an indemnity against a payment the necessity for which might not arise was liable to ad valorem duty. But in that case there was a definite sum fixed at the date of the instrument that might become payable: Alpe on Stamp Duties, 13th ed., p. 189. Agreements not under seal are chargeable, but only if an obligation is created: *National Telephone Co.* v. *Inland Revenue Commissioners* (6); *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Commissioners.* (7)

On the second point it is submitted that, assuming that this instrument is liable to ad valorem duty, it is not liable to the amount claimed by the Commissioners. They claim under the

(1) [1898] 2 Q. B. 507, 513.
(2) [1891] 1 Q. B. 239.
(3) [1899] 1 Q. B. 121.
(4) (1866) 4 M. 1121.
(5) (1852) 1 E. & B. 164.
(6) [1900] A. C. 1.
(7) [1909] 2 K. B. 604.

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schedule "for every 5*l.* of the annuity or sum periodically payable 2*s.* 6*d.*," and they have taken the periodical payment as an annual payment, whereas it is in fact a half-yearly payment. Duty is therefore payable only upon the sum to be paid half-yearly, i.e., on 60,000*l.*: *Jones* v. *Inland Revenue Commissioners* (1); *Clifford* v. *Inland Revenue Commissioners.* (2) These are half-yearly payments within ss. 3 and 4 of the Regulation of Railways Act, 1868.

Sir G. Cave, S.-G., and *W. Finlay, K.C.*, for the Crown, were called upon to argue the second point only. The instrument is a security for the payment of a yearly sum of 120,000*l.* and not for a half-yearly sum of 60,000*l.*: *Lewis* v. *Inland Revenue Commissioners.* (3) An annuity is the grant of a certain sum of money, to be paid by the grantor or his representative, at the expiration of fixed consecutive periods, for a definite term, or for life, or in fee: Lumley on Annuities, p. 1; and the author goes on to say that an annuity is not necessarily annual, but the payments must be at certain intervals.

[SWINFEN EADY L.J. referred to the definition of "annuity" in Co. Litt. 144b.]

That this is an annuity appears from the deed itself: *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Commissioners.* (4) The agreement is not to pay 2 per cent. per half-year, but 4 per cent. per annum.

Roskill, K.C., replied.

SWINFEN EADY L.J. This is an appeal by the Underground Electric Railways Company, Limited, called shortly the Underground Company, against the judgment of Scrutton J. on the hearing of a case stated by the Commissioners of Inland Revenue.

The question which arises upon the appeal is, What is the proper stamp upon a deed bearing date December 13, 1912? The deed has been presented to the Commissioners for adjudication, and they have adjudged, first, that the deed should bear a stamp of 10*s.* There is no question about that. Secondly, that it should bear an ad valorem stamp fixed by the Commissioners at 3000*l.* That

(1) [1895] 1 Q. B. 484.
(2) [1896] 2 Q. B. 187.
(3) [1898] 2 Q. B. 290.
(4) [1909] 2 K. B. 604.

3000*l.* is arrived at by taking 2*s.* 6*d.* for each 5*l.* of a sum of 120,000*l.* The Underground Company appeals.

The appellants contend, first, that the deed is not liable to any ad valorem duty. Their second point is that, assuming it is liable to duty, the Commissioners have assessed it too high, that it ought only to be assessed at 1500*l.*, which is half a crown for every 5*l.* of 60,000*l.*, instead of 3000*l.*, which is at the rate of half a crown for each 5*l.* of the 120,000*l.* [His Lordship stated the facts and the effect of the provisions of the deed, and continued:] That being the nature of the transaction, it was urged that at the date of the deed it was not a security for any sum of money, because at that moment no stockholders had transferred their stock. It was true that a date was fixed by which they might do it, and it is true that the deed was executed in pursuance of arrangements in the nature of preliminary negotiations, but no stockholder had actually transferred his stock, and it was said that there must be correlative obligations on each side. Under the provisions of the Stamp Act unilateral as well as bilateral instruments are chargeable with duty, but apart from that, this deed was a complete and effective deed. It was a deed of covenant between the Underground Company and the trustees whereby the Underground Company covenanted that on the happening of certain events they would pay certain sums of money. It was complete and binding from the date of its delivery. It was then contended that the deed was not a security for "any sum or sums of money at stated periods" as at its date there was no ascertained sum that might become payable, and it was urged that there was no decision upon the language of the schedule now under consideration, that the words extended to money only contingently payable, although there were decisions to that effect under other provisions of the Stamp Act. It has been determined that a deed is liable to be stamped as a security although the instrument itself creates the liability and contains merely a personal covenant or obligation and does not secure or reinforce any antecedent or collateral obligation. It is a security within the meaning of that provision: *National Telephone Co.* v. *Inland Revenue Commissioners.* (1)

Then reference was made to various cases decided upon words

(1) [1900] A. C. 1.

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in the Stamp Act, first with regard to cases deciding the meaning of the words in s. 86, sub-s. 1, under the heading of "Mortgage": "For the purpose of this Act the expression 'mortgage' means a security by way of mortgage for the payment of any definite and certain sum of money advanced." On the meaning of those words, "any definite and certain sum of money," the cases referred to establish that the words "definite and certain" relate to the amount secured, and not to the certainty of payment becoming due—that is to say, that a sum only contingently payable may be a definite and certain sum of money. See *Maxwell* v. *Inland Revenue Commissioners* (1), *Mortimore* v. *Inland Revenue Commissioners* (2), *Lord Canning* v. *Raper* (3), and *City of London Brewery Co.* v. *Inland Revenue Commissioners.* (4) In *Underground Electric Railways Co. of London* v. *Inland Revenue Commissioners* (5) questions arose under s. 56, sub-s. 2, "Where the consideration or any part of the consideration for a conveyance on sale consists of money payable periodically," whether part of the consideration on sale of assets was money payable periodically, and what the meaning of those words was. It was there held by the House of Lords that, although the money was only payable upon the happening of more than one contingency, it was nevertheless money payable periodically within the meaning of those words. Lord Lindley said (6): "Then it is said that the purchasing company may be wound up,"—and he referred to various contingencies upon which the money might become payable—"Unless the contingency of winding up or reducing the capital happens, the minimum sum continues to be payable. The fact that the minimum sum is payable on more contingencies than one is in my opinion quite immaterial."

I am unable to draw any distinction between "money payable periodically" and "money payable at stated periods," and the fact that all the payments were contingent seems to me to be immaterial in considering whether there was a liability to pay under the deed. The proper number of shareholders had to assent and come in under the deed. Subject to that there was an

(1) 4 M. 1121.
(2) 2 H. &. C. 838.
(3) 1 E. & B. 164.
(4) [1899] 1 Q. B. 121.
(5) [1906] A. C. 21.
(6) [1906] A. C. 23.

absolute guarantee. It may well be that if and so long as the Central London Railway paid the full dividend of 4 per cent., then the Underground Railway would have no further liability under its guarantee, but from the date when the instrument was signed there was a binding obligation upon the Underground Railway in certain events that might happen to pay at stated periods certain sums of money.

In my opinion the deed comes within the language of the schedule to the Stamp Act. It is immaterial whether it is the only, or principal, or primary security; it was the security in respect of the guaranteed dividend—it was the only security for "any sum or sums of money at stated periods." Then the duty is upon the sum periodically payable.

Therefore with regard to the first point I am of opinion that the deed was both in fact and in law a deed being "a bond, covenant, or instrument," coming within the language of this schedule, whereby certain sums were contingently made periodically payable. In these circumstances I am of opinion that the first point taken by the appellants fails and that the deed is liable to ad valorem duty.

The next question is whether the ad valorem duty is on 60,000*l.* or 120,000*l.* The deed contains reference throughout to the sum guaranteed being arrived at in this way: it is "4 per cent. per annum on the guaranteed stock." True it is that it is payable half-yearly, but the sum secured by the deed has reference to annual interest on the guaranteed stock at the rate of 4 per cent. The last part of clause 5 of the deed is, "The dividends at the rate of 4 per cent. per annum for the time being payable under this deed on the guaranteed stocks shall be payable half yearly." If the question is asked, What sum is secured by the deed, the answer is that it is a security for 4 per cent. per annum on the guaranteed stock.

Clause 6, in my opinion, has a bearing upon this because it is by reference to the year that the liability of the Underground Company is to be determined. If and when the Central London Railway should pass its dividend for any half-year and then pay its dividends for both half-years together at the end of the year, provision is made at the end of clause 6 of the document for

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refunding to the Underground Company the interim payment that they have made so far as the payment by the Central London Railway would extend, but it is all done by reference to the year, and throughout the liability of the Underground Company to pay is measured by reference to the year.

The cases decided on this point are not of very much assistance. In *Jones* v. *Inland Revenue Commissioners* (1) there was an agreement between a theatrical agent and a telephone company and the language of the agreement there referred to an annual payment; it was to be paid annually. In the case of *Sweetmeat Automatic Delivery Co.* v. *Inland Revenue Commissioners* (2) again it was a yearly rent, and in each of those cases the language of the instrument referred to showed it was a payment by the year.

The case most strongly relied upon by the appellants was *Clifford* v. *Inland Revenue Commissioners.* (3) In that case there was a special agreement under which the manager of an hotel was to pay a fixed sum of 108*l.* 18*s.* per week, and he was also to pay in the event of the owner of the hotel not occupying a bedroom and sitting-room, which the owner was entitled to occupy, an additional 5*l.* a week. The question which arose was whether the weekly payments ought to be multiplied in each case by 52, so as to obtain the total sum that would be payable for a year, and assess the duty as if it were an annual payment. The Court decided that it ought not to be treated on that footing, and ought only to be treated as a weekly payment, and the sum assessed on the payments per week, that is on 108*l.* 18*s.* and 5*l.*, being the maximum weekly payments. Pollock B. said that there was not a single word in the deed itself which contemplated an annual payment. Bruce J. said (4): "There is nothing in the words of the instrument to indicate a yearly payment. The provision of the schedule to the Act seems to me to be framed specially with the view to include cases where the periods of payment are less than a year." So that there was no indication there that the payments were to be annual payments, and the Court decided that the payment was only to be dealt with upon the footing that it was a weekly payment, and the duty assessed on the payment of two weeks. *Lewis* v. *Inland Revenue*

(1) [1895] 1 Q. B. 484.
(2) [1895] 1 Q. B. 484.
(3) [1896] 2 Q. B. 187.
(4) [1896] 2 Q. B. 195.

Commissioners (1) does not appear to be of very much assistance, because in that case the sum covenanted to be paid was an annuity. It was a sum covenanted to be paid during the life of the wife, and as soon as you come to an annuity then no question arises, because an annuity ex vi termini means an annual payment.

Therefore the question comes back to what is the proper construction of this deed. Looking at the deed as a whole, I am of opinion that it is a deed which is security for a sum periodically payable, to wit, 4 per cent. on 3,000,000*l.* or 120,000*l.* a year, and that that sum is payable at stated periods. The distribution is each half-year, but it is measured by reference to the period of a year, and therefore the assessment should be on the full 120,000*l.* and not on the 60,000*l.*

On these grounds I am of opinion that Scrutton J. was right and the appeal fails.

BANKES L.J. I agree, and I do not desire to add anything to what the Lord Justice has said upon the first point which was relied upon by the appellants. On the second point I desire to say just a few words. At one time I felt some difficulty on this point, but the difficulty entirely disappeared upon a closer investigation of the exact language of the statute and the language of the deed. The schedule in the statute includes amongst the documents that have to be stamped a "bond, covenant, or instrument of any kind whatsoever," and then it goes on to define the class or nature of the bond, covenant, or instrument coming within this particular provision. It defines it as being a document, a "bond, covenant, or instrument being the only or principal or primary security for any annuity or for any sum or sums of money at stated periods."

Now that must mean "for any sum or sums of money payable at stated periods," and the first question for consideration is whether the instrument in question is the only or principal or primary security for an annuity or for any sum or sums of money payable at stated periods. If it is, then the next question arises, What is the amount of the duty? The duty is expressed to be "for every 5*l.* and also for any fractional part of 5*l.* of the annuity or sum periodically payable." Now the sum periodically payable is the

(1) [1898] 2 Q. B. 290.

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same sum as is expressed higher up in the schedule as "a sum or sums of money at stated periods." That means the sum or sums of money secured, for which the document is the only or principal or primary security, and therefore the question which has to be considered and determined in each case is in regard to a document which comes within this definition; what are the sum or sums of money secured by the document? Upon that I feel no difficulty at all, and I think the answer is to be found in the last part of clause 5. Taking the deed as a whole you find an answer, but particularly in the last part of clause 5 of the deed, where it is provided that "The dividends at the rate of 4 per cent. per annum for the time being payable under this deed on the guaranteed stocks shall be payable half yearly," and so forth. Therefore it seems to me that it is plainly there stated that the sum secured is the dividend at the rate of 4 per cent. per annum for the time being on the whole of the guaranteed stock, and if that is the right construction of the deed it is quite immaterial that the guarantee is expressed to be a guarantee in respect of each half-yearly payment. The sum secured is the yearly sum, and in my opinion on that ground the decision of Scrutton J. was right, and the appeal ought to be dismissed.

WARRINGTON L.J. I am of the same opinion. There are two questions raised on this appeal. The first is whether the deed in question falls within the definition of a "bond, covenant, or instrument of any kind whatsoever being the only or principal or primary security for any annuity or for any sum or sums of money at stated periods." The second question is, assuming it to be a security within the meaning of the definition, at what rate and in what manner is the ad valorem duty to be assessed?

With regard to the first question, I think it is quite plain that the deed is a security for an annuity or sum or sums of money periodically payable or payable at stated periods. The question turns upon the effect of clause 6 of the deed. Clause 6 of the deed provides that "Subject to the provisions of this deed the Underground Company hereby guarantees that the dividends paid on the guaranteed stocks in respect of each half year . . . . shall be at the rate of 4 per cent. per annum." Accordingly, stating it shortly,

if the dividend shall not be sufficient to pay the stockholders at the rate of 4 per cent per annum, the Underground Company will make it up.

Two reasons have been suggested by the appellants on which it is said that we ought to hold that the deed is not within the definition in the Stamp Act. The first of those is that the deed at its date was not a security at all. In my opinion, that objection is completely answered by authorities by which we are bound, but even in the absence of authority I should have had no doubt whatever that, upon the construction of this statute, a covenant may be a security for the payment of money, and is a security within the meaning of the statute for the payment of money, although there is no independent obligation for which it is intended to be a security. That point is abundantly covered by authority.

Then it is said that the obligation imposed upon the Underground Company is contingent in two ways: first if a certain proportion of stockholders do not accept the provisions of the deed by a certain date, the Underground Company may declare the deed at an end; and secondly, that the profits of the Central London Railway Company may be such that the actual obligation on the part of the Underground Company to pay money will never in fact, or may not, take effect. In my opinion, neither of those considerations affects the question whether the deed is, within the meaning of the statute, a security for the payment of a sum of money. It is a security for the payment of a sum of money notwithstanding that events may happen which enable one or other of the parties to put an end to the obligation of which the security is a part, and notwithstanding that in the event the obligation may not result in the recovery from the obligor of any particular sum of money. That point is also covered by authority.

The second question turns upon the words in the statute defining the mode in which the ad valorem duty is to be assessed. If it is a security for the term of life or for any other indefinite period, then the duty is half a crown for every 5*l.* and also for any fractional part of 5*l.* of the annuity or sum periodically payable. The sum periodically payable there is plainly the sum referred to above as "the sum or sums of money payable at stated intervals."

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Warrington L.J.

The question really is whether this instrument is a security for an annuity, that is, for an annual sum, or whether it is a security for some sum payable at stated intervals other than a year. I will refer again to clause 6 of the agreement, which is the clause which constitutes the obligation of the Underground Company, and that is a guarantee that the dividends paid on the guaranteed stocks in respect of each half-year shall be at the rate of 4 per cent. per annum. The dividends there referred to are defined in the previous clause 5 a few lines higher up in these terms: "The dividends at the rate of 4 per cent. per annum for the time being payable under this deed on the guaranteed stocks shall be payable half-yearly" on certain days, namely, "the last day of February or August (as the case may be) next after the end of each half year."

It seems to me quite plain that what the stockholders are entitled to here is an annual sum representing an annual dividend at the rate of 4 per cent. per annum on the amount of the stocks held by them. That is the dividend which is secured by the deed, and it seems to me that that is really an annuity, although it is payable at periods less than a year. I think the Solicitor-General's argument was correct, that this comes under that part of the definition which refers to an annuity rather than under that part of it which refers to a sum payable at stated periods.

For these reasons I agree that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Bircham & Co.; Solicitor of Inland Revenue.*

H. C. R.

[IN THE COURT OF APPEAL.]

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Nov. 10, 11, 25.

SKELTON *v.* BAXTER.

Employer and Workman—Compensation—Injury by Accident arising out of and in Course of Employment—National Insurance—Approved Society—Right to take Proceedings against Employer in Workman's Name—National Insurance Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 55), *s.* 11, *sub-s.* 2.

The intention of s. 11 of the National Insurance Act, 1911, is that an insured person who has been injured by accident in the course of his employment shall look primarily to any compensation which he may be entitled to recover from his employer, and shall rely upon the sickness and disablement benefit under the Insurance Act only where no compensation is payable, or where it is less in amount than the benefit to which he is entitled under the Insurance Act. Sect. 11, sub-s. 2, which gives an approved society the right of using the workman's name when he unreasonably refuses or neglects to take proceedings for compensation against his employer, does not deprive the society of any right it may have of assisting an injured workman to recover compensation. The society may properly inform him that he is entitled to compensation and suggest that he should take proceedings, and if the workman wishes to enforce his claim, and the society obtains for its own solicitor the necessary authority to act and agrees to indemnify the applicant against costs, the proceedings may none the less be held to be taken by the applicant, and not by the society in its own interest.

Appeal from an award of the judge of the Southend County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The application for compensation was in respect of an accident arising out of and in the course of the employment of Mrs. Annie Skelton as a domestic servant by the respondent, Mrs. Baxter. It was not disputed that there was an accident arising out of and in the course of the employment, but on the hearing of the application the question arose, apart altogether from the merits of the case, whether it ought to be dismissed on the ground that the proceedings were not taken by or on behalf of the applicant, but were really instituted by the Prudential Approved Society in its own interest under s. 11, sub-s. 2, of the National Insurance Act, 1911. (1)

(1) By s. 11, sub-s. 2, of the National Insurance Act, 1911, "where an insured person appears to be entitled to any such compensation or damages as aforesaid and unreasonably refuses or

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After the accident the applicant received 8*l.* 10*s.* from Mrs. Baxter by way of compensation at the rate of 10*s.* a week, but she declined an offer of a further sum of 2*l.* 10*s.* in full satisfaction of her claim. She then got into communication with the agent of the Prudential, her approved society under the National Insurance Act. He informed her that she would not be able to get any money under the Insurance Act because her card had not been properly stamped. She then, on the invitation of Mr. Pratt, the solicitor for the Prudential Approved Society, went to see him at his office. He asked her if she wished to claim compensation from Mrs. Baxter and she said she did. Mr. Pratt, having ascertained from her the particulars of the accident, then sent to Mrs. Baxter the following notice: "Take notice that Annie Skelton . . . . was on the 27th day of July, 1914, injured by an accident arising out of and in the course of her employment by you. . . . . She claims the sum of 10*s.* per week during incapacity from the 10th day of August, 1914. Annie Skelton."

On January 29, 1915, Mr. Pratt wrote to Messrs. Houghton Fry & Young, of Southend-on-Sea, who were the local solicitors of the Prudential, the following letter:—

"I enclose papers in this case which appears to me to be one where, having regard to the attitude of the Phœnix" (the society with which Mrs. Baxter was insured against liability under the Workmen's Compensation Act), "proceedings for arbitration should be commenced at once. If Mrs. Skelton will instruct you to act as her solicitors in the matter the approved society will give her financial assistance."

On January 30, 1915, Messrs. Houghton Fry & Young wrote to Mrs. Skelton:

"*Re* yourself and Baxter.

"We have received the papers in this matter and understand that you have been paid a sum of 8*l.* 10*s.* on account of compensation, and

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neglects to take proceedings to enforce his claim, it shall be lawful for the society or committee concerned, either—(*a*) at its own expense, to take in the name and on behalf of such person such proceedings, in which case any compensation or damages recovered shall be held by the society as trustee for the insured person; or (*b*) to withhold payment of any benefit to which apart from this section such person would be entitled."

that a further sum of 2*l.* 10*s.* was offered you in full settlement of any liability for compensation due to you, but which (1) sum has not been accepted as you had not then recovered from the results of your accident.

" As apparently the employers will not pay any further compensation without proceedings we shall be glad to know whether you wish proceedings to be instituted on your behalf, if so perhaps you will kindly sign the enclosed retainer so that we may proceed. The proceedings will, of course, have to be instituted by you in your own name if you wish to endeavour to enforce the payment of further compensation and you will be liable to us as your solicitors for costs in the matter. We understand, however, that as the Prudential Approved Society have a financial interest in the matter they are willing to indemnify you from any costs you may have to pay us."

On receipt of this letter Mrs. Skelton signed and returned to Messrs. Houghton Fry & Young the following retainer :—

" I hereby retain and instruct you to act on my behalf as applicant in an action in the Southend County Court against Mrs. Baxter, and I authorise you to take all such steps in the conduct of such action as you shall deem advisable, and I agree to pay your proper costs for all work done by you in the matter. All costs (if any) that may be allowed me by the Court to be credited to me when received by you."

Proceedings for an arbitration were then commenced in the name of Mrs. Skelton against Mrs. Baxter. The county court judge, after hearing the evidence of Mrs. Skelton and other witnesses, came to the conclusion upon the facts that the proceedings were brought by the applicant and that she was the real party. He then made an award in her favour with costs.

Mrs. Baxter appealed. She did not desire to disturb the award, but by her notice of appeal she asked for an order that so much of the decision as ordered that she should pay the applicant's costs might be set aside, and that the Prudential Approved Society should pay her costs of the arbitration, or alternatively that the case be remitted for further hearing, and that the Prudential should pay the costs of the appeal.

The grounds of the appeal were (1.) that the county court judge

(1) *Sic.*

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had misdirected himself in his application of the provisions of s. 11, sub-s. 2, to the facts before him, and (2.) that on the facts found by the judge or admitted he ought, in law, to have held that the real applicants were the society and should have dismissed the application with costs against the society.

Gordon Hewart, K.C., and *George Marsden*, for the appellant. The question is whether an approved society is entitled to take proceedings under the Act notwithstanding that the workman has not unreasonably refused to do so. In *Rushton* v. *George Skey & Co.* (1) it was held that it was a condition precedent to an approved society taking proceedings that the workman had unreasonably refused or neglected to do so. In *Allen* v. *Francis* (2) the Court said that a workman might be helped by his approved society.

It is submitted that the proceedings in this case were really those of the Prudential Approved Society. They initiated, controlled, and were financially responsible for them. They got no more than the ignorant assent of the applicant to proceedings being taken. There was no evidence on which the county court judge could properly find that the real applicant before him was Mrs. Skelton. There are two sets of circumstances in which the approved society may take proceedings—(1.) where the condition precedent is satisfied that the workman has unreasonably refused or neglected to take them, and (2.) where the approved society is acting for the workman.

The observations of Phillimore L.J. in *Burnham* v. *Hardy* (3) are an unnecessary enlargement of what was said by the Master of the Rolls in *Allen* v. *Francis*. (2)

Two courses are open to this Court—(1.) to say that the county court judge ought to have dismissed the proceedings, and therefore this Court will decide in favour of the appellant, or (2.) to send the case back to the county court. We ask the Court to adopt the first course. [They also referred to *Bobbey* v. *Crosbie*. (4)]

Holman Gregory, K.C., and *L. S. Fletcher*, for the respondent. The question involved is one of fact, and there has been no mis-

(1) [1914] 3 K. B. 706.
(2) [1914] 3 K. B. 1065.
(3) (1915) 8 B. W. C. C. 57.
(4) (1915) 8 B. W. C. C. 236, 238.

direction of himself by the learned county court judge. The appeal therefore must fail. The county court judge has found as a fact that Mrs. Skelton acted for herself and was the real applicant in this case. She had not unreasonably refused or neglected to take proceedings, and the approved society was not therefore in a position to proceed under s. 11, sub-s. 2, of the National Insurance Act, 1911: *Rushton* v. *George Skey & Co.* (1) The award is conclusive of the facts here, and there has been nothing reprehensible in the conduct of the Prudential. Having regard to the notice of appeal, Mrs. Baxter must be taken to have accepted the award, and cannot therefore appeal against it: *Johnson* v. *Newton Fire Extinguisher Co.* (2)

On the evidence the Prudential have only endeavoured to protect the interests of the injured person with her approval and at her request.

Gordon Hewart, K.C., in reply.

Cur. adv. vult.

Nov. 25. LORD COZENS-HARDY M.R. This is an appeal by an employer against an award of the county court judge giving compensation to a domestic servant. Upon the merits there is no dispute. But an objection is taken that this is not really an application by the servant, but is in truth an application instigated and carried on by the Prudential Approved Society in her name but at the society's expense, and that on that ground the county court judge ought to have dismissed the application. Sect. 11, sub-s. 2, confers upon an approved society a right to take proceedings at its own expense in the name and on behalf of the insured person, but only if such person has "unreasonably declined or neglected" to take proceedings. It has been held in this Court that that is a condition precedent to the right of the approved society to take proceedings, and it is plain that in the present case there was no such neglect or refusal. That section has really nothing to do with the present case.

It is a matter of fact for the county court judge whether the application was in truth Skelton's application. I am clearly of opinion that there was ample evidence upon which he could so find and that we cannot interfere with his decision. There was no

(1) [1914] 3 K. B. 706. (2) [1913] 2 K. B. 111.

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misdirection on his part. The retainer signed by Skelton and the letters written by her would lead me to the same conclusion.

In my view it makes no difference that the Prudential Approved Society gave her a partial indemnity and found the money for the Court fees and counsel's fees. That may or may not be, in the view of the law, maintenance, and may or may not expose the society to an action based on maintenance, but the circumstance that the plaintiff has been "maintained" by a third person would be no defence to the proceedings.

I do not consider it necessary to discuss the very obscure provisions of s. 11, or the precise position of an approved society in regard to maintenance.

I will only add that, although there are several letters written by the agents of the Prudential Approved Society which invite hostile criticism, I do not think it is made out that the course adopted in the present case is a deliberate attempt to escape the liability to pay costs which is imposed upon an approved society acting under s. 11, sub-s. 2.

The appeal fails and must be dismissed with costs.

BANKES L.J. In this case the question which the county court judge had to decide was really a question of fact. Unless, therefore, the appellant can succeed in showing that the judge misdirected himself upon the law as applicable to the facts the appeal must fail. In my opinion there was no misdirection, and the appeal fails.

I might content myself with leaving the matter there, were it not that a question of wide and general importance has been discussed before us, namely, the relative positions of an approved society and an insurance company undertaking accident insurance business in cases where an accident has happened to an insured workman. Sect. 11 of the National Insurance Act, 1911, provides that when an insured person is entitled to receive or recover from his employer compensation under the Workmen's Compensation Act, 1906, or under the Employers' Liability Act, 1880, or at common law in respect of an injury, sickness or disablement benefit is not to be paid to such person where the amount of compensation is equal to or exceeds the amount of the benefit; but where it is less, the

difference between the amount of the compensation and the amount of the benefit may be paid. The intention of the section obviously is that the insured person should look primarily to any compensation to which he may be entitled, and should fall back upon the sickness and disablement benefit only in cases where no compensation is payable or where it is less in amount than the benefit to which the insured person is entitled under the Act. This state of things naturally produces a conflict of interest between the approved society of the injured workman and the insurance company with which the employer of the workman is insured. It is to the interest of the approved society that the workman shall insist upon his right to be paid compensation. It is to the interest of the insurance company that the workman should claim sickness or disablement benefit instead of compensation. What the insurance company in the present case are (in the name of the employer) really endeavouring to do is to establish the proposition that, except in the limited class of cases provided for in sub-s. 2 of s. 11 of the National Insurance Act, 1911, an approved society has no right to encourage or assist an injured workman to take proceedings against his employer to recover compensation. In my opinion the contention is not well founded. Sub-s. 2 is an enabling section giving an approved society the right as against the workman of using his name to take proceedings to recover compensation in cases where the workman unreasonably refuses or neglects to take proceedings himself to enforce his claim. In cases where an approved society admittedly takes proceedings in the name of the workman, and when the condition precedent of a refusal by the workman has not been fulfilled, it has been held that the proceedings are improperly brought and must be dismissed: *Rushton* v. *George Skey & Co.* (1)

An entirely different question arises in cases like the present where the injured workman is a consenting party to the proceedings and the claim is made that the proceedings are his proceedings, properly taken by him, and not proceedings taken in his name and on his behalf by the approved society. Where this question is in issue it must be determined as between the injured workman and his employer, who are at any rate the nominal parties to the proceedings; and the interests of the workman must not be lost sight

(1) [1914] 3 K. B. 706.

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of in the struggle between his approved society and the insurance company with whom his employer is insured. The case was argued before us by the appellant as though sub-s. 2 of s. 11 deprived the approved society of any legitimate right it might have of assisting an injured workman to recover compensation. In my opinion it does nothing of the kind. Where, as here, it is alleged that the proceedings are not the proceedings of the injured workman, but are the proceedings of the approved society, the issue must be an issue of fact. That the approved society suggested the proceedings or encouraged them, or nominated the solicitor to be retained by the workman and undertook to pay his costs, may all be relevant matters to be taken into consideration, but they are not conclusive on the question whether, in spite of all the assistance and initiative of the approved society, the proceedings are or are not in truth and in fact the proceedings of the injured workman.

I doubt whether it is either possible or advisable to attempt to lay down any general rule as to what amount of interference by an approved society is legitimate, or whether it is material to consider whether the interference is such as might amount to maintenance. Every case must, as it seems to me, depend upon its own particular circumstances, and the county court judge having come to a decision upon the facts without any misdirection, the appeal must fail whether we agreed with his view or not.

During the course of the argument the counsel for the approved society invited an expression of opinion from the Court as to whether their proceedings had not throughout been regular and legitimate. I say nothing about the alleged statement by the agent, as to which there may be some mistake, but I do desire to say that I do not approve of the form of the letter dated January 30, 1915, addressed to the injured workman. It is in my opinion likely to lead to misconception, not so much from what it says, but from what it omits to say. The object of the letter being to obtain a workman's consent to taking proceedings himself, that is to say, proceedings in which he would become liable to pay costs to his employers if he failed, the entire position ought to be pointed out to the workman, and in addition to being told that the approved society would pay the costs of his solicitor he should be told what his position is with regard to any costs to which he might become liable to his opponent.

Unless this is done a person who is not conversant with this kind of question is likely to be misled, as the applicant in this case was misled, and cannot be said to have been given a proper opportunity to exercise a free choice.

WARRINGTON L.J. The question, and the only question, which the county court judge had to decide was whether the proceedings before him were taken by the applicant, or whether they were taken by the society in her name. If the latter were the true view the condition precedent to proceedings being so taken was absent and they ought to have been dismissed.

The question was one of fact. The county court judge has found that the proceedings were taken by the applicant. In my opinion there was ample evidence to justify that finding, and I cannot see that there was any misdirection of himself by the learned judge. The suggested mistake in law as to the true meaning and effect of s. 11, sub-s. 1, of the National Insurance Act, 1911, if it be a mistake, was in my opinion irrelevant. What I have said is enough to show that in my opinion the appeal should be dismissed; but questions have been discussed of great importance to approved societies, and I think I ought to state my views upon them.

Under sub-s. 1 of s. 11 of the National Insurance Act I think it is clearly in the interests of the approved society, as administrator of the insurance funds placed in its hands, to reduce the drains upon it as far as may be, and therefore, in the case of insured persons having claims under the Workmen's Compensation Act, to encourage and assist in the prosecution of such claims. For this purpose I see no reason why the society should not inform the injured workman that in its opinion he is entitled to compensation, and even suggest that he should take proceedings to recover it where the employer does not concede his claim. Further, if the workman wishes to enforce his claim and the society obtains for its own solicitor the necessary authority to act and agrees to indemnify the applicant against costs, the proceedings are none the less taken by the applicant. I can see no distinction in this respect between the society and a private person who thus acts. If a private person instigates proceedings, obtains authority for his solicitor to act, and gives the plaintiff an indemnity against costs, that person may

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be liable to an action for maintenance, but the action is none the less the plaintiff's action and must be dealt with as such. The plaintiff in such an action retains the control in this sense, that if, for example, he comes to terms with the defendant he could not be prevented from withdrawing, although it is true in such a case he might not be able to insist on his indemnity. The society in the present case have certainly not done more than I have described above, and I should have come to the same conclusion as the county court judge.

It has, however, been contended that s. 11, sub-s. 2, of the National Insurance Act in some way imposes a restriction on the freedom of the society to act as the adviser and supporter of an insured person in the matter of proceedings, and introduces a distinction between proceedings taken at its instance and at its expense and those taken at the instance and at the expense of a private person. In my opinion this is not so. The sub-section gives it authority to take proceedings in certain cases on its own account though in the name of the insured person, an authority which it would not otherwise enjoy; but it does not, in my opinion, affect the question whether proceedings not taken under this authority were taken by the insured person or not.

Speaking for myself, I think it would have been well had the society made it clear to the applicant whether or not the indemnity extended to any costs she might be ordered to pay, but except for this I see nothing in the conduct of the society which calls for blame. Indeed, having regard to the frequently humble condition of the workman and to the fact that in most cases the employer defends himself through an insurance company, it is often necessary in the interests of justice that the workman should be advised and assisted by such a body as this society.

Appeal dismissed.

Solicitors: *Watson, Sons & Room; A. E. Pratt, for E. Houghton Fry & Young, Southend-on-Sea.*

G. A. S.

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Dec. 1, 20.

National Insurance—Panel Doctor—Extravagant Prescriptions—Power of Insurance Committee to surcharge Doctor—National Insurance Act, 1911 (1 & 2 *Geo.* 5, *c.* 55), *ss.* 8, 15, 65—*National Health Insurance* (*Medical Benefit*) *Regulations*, 1913, *reg.* 40—*Validity of.*

Regulation 40 of the National Health Insurance (Medical Benefit) Regulations, 1913, which provides that an insurance committee, constituted by the National Insurance Act, 1911, may, if satisfied that an excessive demand upon their drug fund has arisen owing to orders given by a practitioner on their panel which are extravagant either in character or in quantity, surcharge the practitioner, is not ultra vires.

Trial of action before Rowlatt J.

The plaintiff was a qualified medical practitioner on the panel constituted for the county of Middlesex under the National Insurance Act, 1911, having been placed upon that panel under an agreement made between him and the defendant committee dated December 5, 1913, and incorporating the National Insurance Acts, 1911 and 1913, and the National Health Insurance (Medical Benefit) Regulations, 1913.

By s. 8 of the National Insurance Act, 1911, the benefits conferred upon insured persons by Part I. of the Act include "medical treatment and attendance, including the provision of proper and sufficient medicines."

By s. 15, sub-s. 1, "Every insurance committee (1) shall, for the purpose of administering medical benefit, make arrangements with duly qualified medical practitioners in accordance with regulations made by the Insurance Commissioners."

By sub-s. 2 regulations are to be made by the Insurance Commissioners to secure amongst other things "a right on the part of any insured person of selecting . . . . from the appropriate list the practitioner by whom he wishes to be attended and treated."

By s. 65, "The Insurance Commissioners may make regulations

(1) The "insurance committee" is a committee constituted for a county or county borough under s. 59 of the National Insurance Act, 1911. It is referred to in the National Health Insurance (Medical Benefit) Regulations, 1913, as "the committee."

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for any of the purposes for which regulations may be made under this Part of this Act or the schedules therein referred to . . . . and generally for carrying this Part of this Act into effect, and any regulations so made shall be laid before both Houses of Parliament as soon as may be after they are made, and shall have effect as if enacted in this Act: Provided that, if an address is presented to His Majesty by either House of Parliament within the next subsequent twenty-one days on which that House has sat next after any such regulation is laid before it, praying that the regulation may be annulled, His Majesty in Council may annul the regulation, and it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder."

The Insurance Commissioners, purporting to act under that section, made certain regulations, known as the National Health Insurance (Medical Benefit) Regulations, 1913, which were duly laid on the tables of both Houses of Parliament and were not objected to.

By reg. 40 of those regulations it was provided as follows: "(1.) Where it appears to the panel committee (1) that by reason of the character or amount of the drugs or appliances ordered for insured persons by any practitioner or practitioners on the panel, the cost of the supply of those drugs and appliances is in excess of what may reasonably be necessary for the adequate treatment of those persons, the panel committee may, and if any representations to that effect are made to them by the pharmaceutical committee (2), shall, make an investigation into the circumstances of the case, whether in respect of the drugs and appliances ordered by an individual practitioner or generally as to the orders given for drugs and appliances by practitioners on the panel."

"(2.) The panel committee shall, after hearing the pharmaceutical committee and any practitioner concerned, make a report to the committee, and if, after considering the report, the committee

(1) The "panel committee" is a committee appointed by the practitioners on the panel under s. 32 of the National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37).

(2) The "pharmaceutical committee" is a committee elected under s. 33 of the National Insurance Act, 1913, by the persons, firms, and bodies corporate who have agreed with the insurance committee to supply drugs, medicines, and appliances to insured persons.

are of opinion that an excessive demand upon the drug fund has arisen owing to orders given by a practitioner which are extravagant either in character or in quantity they may, if they think fit, make such deduction from the amount payable to that practitioner by the committee as they think fit and shall pay the amount so deducted to the credit of the drug fund: Provided that the practitioner shall be entitled to appeal to the Commissioners, whose decision shall be final."

In April, 1915, the Middlesex Panel Committee reported to the defendants that the average cost of the plaintiff's prescriptions was about 2*s.* 4*d.*, whereas the average cost of the prescriptions for insured persons in the whole county was about 9*d.*; that the plaintiff's prescriptions in many cases contained ingredients which were wholly unnecessary, and that certain drugs were ordered by the plaintiff in excessive quantities; and that after hearing the plaintiff they were of opinion that by reason of those facts a demand had been made upon the drug fund in excess of what was reasonably necessary to the amount of 323*l.* 2*s.* 8½*d.*; and advised that the plaintiff be surcharged to that amount.

On May 8, 1915, the defendants considered the panel committee's report and resolved that the plaintiff should be surcharged in the said sum.

The plaintiff thereupon brought this action claiming, inter alia, a declaration that reg. 40 above mentioned was ultra vires and void, and an injunction to restrain the defendants from surcharging him in accordance with their resolution.

Rigby Swift, K.C., and *Alex. Neilson*, for the plaintiff. Regulation 40 was ultra vires the Commissioners. The effect of ss. 8 and 15 of the Act of 1911, which provide that every insured person shall be gratuitously supplied with proper and sufficient medicines and shall have a right to choose his own medical practitioner from the panel, is to make the medical practitioner the sole judge as to what is necessary for the patient. There is nothing in the Act empowering the insurance committee to penalize a doctor for ordering for his patient better treatment than is ordered by other doctors, so long as he acts bona fide, however mistaken his judgment may be. If he is guilty of fraudulent collusion with the druggist the committee's

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remedy is to prosecute him under the general law. If the excessive character of his prescriptions is such as to point to his inefficiency, their remedy is to remove him from the panel. But requiring him to pay for honest mistakes is opposed to the scheme of the Act. If the regulation is outside the authority conferred on the Commissioners by s. 65, the fact that the regulations were laid and remained on the tables of both Houses for the time specified in the section cannot give them any validity, notwithstanding the provision that they "shall have effect as if enacted in this Act." Such a delegation of its legislative functions is outside the power of Parliament, and s. 65 must be read as meaning that "any regulations so made," that is to say, which are intra vires, shall be treated as if they were enacted in the Act.

Clavell Salter, K.C., and *R. A. Wright*, for the defendants. Regulation 40 is valid. Even if it were not within the purposes for which s. 65 authorizes regulations to be made, its propriety cannot be questioned, for the section says that it is to be treated as part of the Act. The effect of a similar provision in the Patents, Designs, and Trade Marks Act, 1883, was considered in *Institute of Patent Agents* v. *Lockwood.* (1) Power was given by s. 101, sub-s. 3, of that Act to the Board of Trade to make general rules for certain specified purposes, which rules when made were to "be of the same effect as if they were contained in this Act," provided that they should be laid on the tables of both Houses of Parliament, and that if either House within forty days resolved that any such rules should be annulled they were to be of no effect. The Board of Trade made certain rules under that section which were laid before Parliament and not objected to within the time so limited. The majority of the House of Lords held that even if the rules were not intra vires it was not competent for any Court of law to question their authority. Secondly, reg. 40 was intra vires the Commissioners. It was necessary to provide means for preventing reckless waste of the drug fund, and the rule in question was in conformity with the scope of the Act. Thirdly, whether the regulation was valid or not, the plaintiff cannot be heard to question its validity. For by his contract with the defendants, under which he was admitted upon the panel, he

(1) [1894] A. C. 347.

agreed to be employed on the terms of the regulation, which was expressly incorporated in the contract.

Rigby Swift, K.C., in reply. The wide proposition which was laid down in *Institute of Patent Agents* v. *Lockwood* (1) that the rules which had been laid before Parliament and not objected to were not open to review and consideration by the Courts was not necessary to the decision ; for all the Lords agreed that the particular rules there in question were intra vires.

ROWLATT J., after having found the facts as above stated, proceeded as follows : Now I come to another part of the case altogether, one which is of much greater importance than the particular facts. It is said by Mr. Rigby Swift that reg. 40, which provides for this surcharging, is bad altogether as being ultra vires the Commissioners who made it. It is a regulation which purports to provide the machinery and tribunal for the surcharging of a doctor who has been guilty of extravagance in prescribing. The power to make regulations is contained in s. 65 of the Act, which says "The Insurance Commissioners may make regulations . . . . generally for carrying this Part of this Act into effect." If this regulation can be supported it must be so under those words. Mr. Rigby Swift says that the regulation in question is contrary to the scheme of this part of the Act, and therefore is not a regulation for carrying it into effect, because he says that the scheme was that insured persons were to be entitled without payment to medical attendance and a supply of drugs according to the judgment, and the unfettered judgment provided it is honest, of the practitioner on the panel whom they choose to select. Let me see whether that is correct. By s. 8 insured persons are entitled to "medical treatment and attendance including the provision of proper and sufficient medicines." Then by s. 15, sub-s. 1, "Every insurance committee shall, for the purpose of administering medical benefit, make arrangements with duly qualified medical practitioners in accordance with regulations made by the Insurance Commissioners." By sub-s. 2, "The regulations made by the Insurance Commissioners shall provide for the arrangements made . . . . being such as to secure that insured persons shall

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. . . . receive adequate medical attendance and treatment from the medical practitioners with whom arrangements are so made," and to secure "(c) a right on the part of any insured person of selecting . . . . from the appropriate list the practitioner by whom he wishes to be attended and treated." By sub-s. 5, "Every such committee shall also make provision for the supply of proper and sufficient drugs and medicines and prescribed appliances to insured persons in accordance with regulations made by the Insurance Commissioners, which shall provide for the arrangements made, . . . being such as to enable insured persons to obtain . . . . such drugs, medicines, and appliances if ordered by the medical practitioner by whom they are attended." Now that certainly gives the insured person the right to have adequate medical attendance and to choose his own doctor; but it does not seem to me that it means that the doctor is to exercise his uncontrolled discretion in the matter. The Act is worked upon a scheme that there is to be a fund to provide for these drugs as well as to pay the doctors, and it is obvious that there is a limit to the amount available for that purpose. The duty of prescribing for any patient necessarily involves that the prescription must be reasonable according to the resources available for pay. A doctor when prescribing for a private patient might often prescribe a less expensive medicine when the patient was a person of slender means than when he was a person whose means were large. For the same reason there must be a duty on a panel doctor not to be extravagant or reckless in ordering medicines which are unnecessarily expensive. In order to carry out the Act it is clear that there must be some provisions for preventing the drug fund from being wasted by extravagance; and that is the very thing that reg. 40 was designed to effect. It says that if a doctor prescribes extravagantly he must pay for it himself, and it sets up the machinery for doing that. It seems to me, therefore, that this regulation is within the power to make regulations generally for carrying this part of the Act into effect. Under these circumstances it becomes unnecessary for me to decide whether, assuming that it was ultra vires the Commissioners to make the regulation at all, it became valid by reason of its having remained on the tables of both Houses of Parliament without objection made within the time specified in the section, or whether it is given

validity in this particular case by reason of the reference made to it in the agreement between the defendants and the plaintiff. There must be judgment for the defendants.

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Judgment for defendants.

Solicitors for plaintiff: *Hempsons.*
Solicitors for defendants: *Rogers, Sons & Abbott.*

J. F. C.

[COURT OF CRIMINAL APPEAL.]

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Dec. 6, 17.

THE KING *v.* LEE KUN.

Criminal Law—Trial—Foreigner—Ignorance of English—Translation of Evidence—Practice.

When a foreigner who is ignorant of the English language is on trial on an indictment for a criminal offence, and is not defended by counsel, the evidence given at the trial must be translated to him, and compliance with this rule cannot be waived by the prisoner. If he is defended by counsel, the evidence must be translated to him unless he or his counsel express a wish to dispense with the translation and the judge thinks fit to permit the omission, but the judge should not permit it unless he is of opinion that the accused substantially understands the nature of the evidence which is going to be given against him.

APPLICATION for leave to appeal against conviction.

The appellant was indicted at the Central Criminal Court for the murder of one Clara Thomas and was convicted. He was a native of China and did not understand the English language. No application was made at the trial by the counsel who appeared for the appellant that the evidence might be translated to the appellant, and none of the evidence was translated. The same counsel and solicitor had appeared for the appellant when he was charged before a magistrate, and on that occasion all the evidence had been translated by an interpreter. The evidence given at the trial did not differ from that recorded in the depositions taken before the magistrate.

Tristram Beresford, for the appellant. The omission to translate the evidence constitutes such a serious irregularity in the proceedings

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that the conviction ought to be quashed. A trial for felony must take place in the presence of the accused. A prisoner who does not understand the language spoken by the witnesses is not present, in the technical sense. It is immaterial that the appellant's counsel did not ask to have the evidence translated. In trials for misdemeanour a prisoner can waive his rights: *Rex* v. *Morphew* (1); but he cannot do so in a case of felony: *Rex* v. *Streek* (2); *Reg.* v. *Bertrand.* (3) In the latter case Sir John T. Coleridge (4) emphasized the necessity of the jury being able to observe "the manner of the prisoner, when that has been important, upon the statement of anything of particular moment." A prisoner who does not understand the evidence cannot give instructions for cross-examination in the course of the trial; nor can he effectively exercise his right to make a statement to the jury, which he is entitled to do although defended by counsel. This question arose in Hongkong in the case of *Rex* v. *Kwok Leung* (5), in which Piggott C.J. reviewed all the authorities and the Court held that, where on a trial for felony the evidence for the prosecution was given in a language of which the prisoners were wholly ignorant and was not translated to them, the conviction must be quashed, and that it made no difference that the prisoners were defended by counsel and that counsel had not asked for the evidence to be translated.

It is not suggested that the speeches of counsel for the prosecution or the defence or the summing-up of the judge need be translated to the prisoner, for the speeches form no essential part of a trial, and the real purpose of the summing-up is to direct the jury as to the law. There is no obligation on a judge to sum up the facts, and, therefore, there is no necessity to have the summing-up translated for the benefit of the prisoner. [He also referred to *Reg.* v. *Yscuado* (6) and *Reg.* v. *Moore.* (7)]

Bodkin (*E. C. P. Boyd* with him), for the Crown. A prisoner who is a foreigner and who does not understand English is entitled as of right, if he is not defended by counsel, to have all the evidence translated to him. That has been the practice at the Central

(1) (1814) 2 M. & S. 602.
(2) (1826) 2 C. & P. 413.
(3) (1867) L. R. 1 P. C. 520.
(4) L. R. 1 P. C. 535.
(5) (1909) 4 Hongkong L. R. 161.
(6) (1854) 6 Cox, C. C. 386.
(7) (1892) 61 L. J. (M.C.) 80.

Criminal Court for many years. But where the prisoner is defended by counsel he is not entitled as of right to have the evidence translated. The prisoner identifies himself with his counsel, and it is for the counsel to say whether he wants the evidence or any part of it translated. If he does not do so, the fact that the evidence has not been translated does not afford any ground for quashing the conviction. The case of *Rex* v. *Kwok Leung* (1) is of course not an authority binding on this Court, but the decision was to a certain extent founded on dicta in *Reg.* v. *Bertrand* (2) which were unnecessary for the decision and which were commented on in *Ex parte Bottomley.* (3)

In the present case all the evidence at the police court was translated, and as the evidence at the trial did not depart from the depositions, the omission to have an interpreter at the trial cannot by any possibility have caused any injustice or hardship to the appellant.

Tristram Beresford in reply. A prisoner cannot be deprived of his rights by anything which his counsel may do or omit to do. In *Rex* v. *Pritchard* (4) a deaf mute was found by the jury to be incapable of taking his trial, but if the argument of the Crown as to the identification of a prisoner with his counsel is well founded, the prisoner in *Rex* v. *Pritchard* (4) might have been defended by counsel and the trial could have proceeded. [He also referred to *Neale* v. *Gordon Lennox.* (5)]

LORD READING C.J. The Court are of opinion that this application for leave to appeal, which has been argued as an appeal, should be refused. The reasons for our decision will be given at a later date.

Dec. 17. The judgment of the COURT (Lord Reading C.J., Scrutton and Low JJ.) was read by

LORD READING C.J. The appellant, Lee Kun, a Chinese, was convicted of the murder of one Clara Thomas. He appeals to this Court to quash the conviction on the ground that, being a foreigner

(1) 4 Hongkong L. R. 161.
(2) L. R. 1 P. C. 520.
(3) [1909] 2 K. B. 14.
(4) (1836) 7 C. & P. 303.
(5) [1902] A. C. 465.

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and ignorant of the English language, he did not understand the evidence for the prosecution, which was not translated to him. Mr. Beresford, in an able argument, contended, notwithstanding that the appellant was represented at the trial by counsel and that no application was made for the translation of the evidence for the Crown, that the omission to have the evidence translated constituted a grave irregularity in the proceedings, and that in consequence the conviction should be quashed.

The Court is of opinion, having regard to the facts and circumstances of this case, that the appeal must be dismissed, whether or not there has been an irregularity, as contended, in the proceedings, on the ground that no substantial miscarriage of justice has actually occurred: see s. 4, sub-s. 1, of the Criminal Appeal Act, 1907. If the evidence had been translated to the appellant the same verdict would inevitably have resulted.

The issue was quite simple. The Crown's case was that the appellant inflicted the fatal wound on the deceased. The case for the defence was that the wound was inflicted by the deceased upon herself. [His Lordship dealt with the facts of the case and continued:]

After careful examination of the evidence and of the proceedings at the trial, and assuming that there was irregularity as contended, this Court is satisfied that no substantial miscarriage of justice has actually occurred, and, therefore, in accordance with the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, the appeal should be dismissed.

Notwithstanding that we have arrived at this conclusion, we think it advisable to deal with the abstract question raised. When a foreigner who is ignorant of the English language is on trial on an indictment for a criminal offence and is undefended, the evidence given at the trial must be translated to him. If he states that he understands part of the evidence and does not wish that part translated, unless the judge in his discretion thinks otherwise, it need not be translated, because the object of the translation is already achieved. For example, if an agreement in writing signed by the accused is put in evidence by the Crown, it might well be that the accused knew the contents and did not wish a translation. He is not thereby admitting any part of the case against him, but

merely that he understands that part of the evidence. If he does not understand the English language, he cannot waive compliance with the rule that the evidence must be translated; he cannot dispense with it by express or implied consent, and it matters not that no application is made by him for the assistance of an interpreter. It is for the Court to see that the necessary means are adopted to convey the evidence to his intelligence, notwithstanding that, either through ignorance or timidity or disregard of his own interests, he makes no application to the Court. The reason is that the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State. Every citizen has an interest in seeing that persons are not convicted of crimes, and do not forfeit life or liberty, except when tried under the safeguards so carefully provided by the law.

No trial for felony can be had except in the presence of the accused, unless he creates a disturbance preventing a continuance of the trial: see Stephen's Digest of Criminal Procedure, p. 194, and *Reg.* v. *Berry* (1), per Wills J. Even in a charge of misdemeanour there must be very exceptional circumstances to justify proceeding with the trial in the absence of the accused. The reason why the accused should be present at the trial is that he may hear the case made against him and have the opportunity, having heard it, of answering it. The presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings. The prisoner may be unable, through insanity or deafness or dumbness, or the combination of both conditions, to understand the proceedings or to hear them, either directly or by reading a record of them, or to answer them either by speech or writing. In these cases a jury is sworn to ascertain whether the prisoner is "fit to plead," which is interpreted in *Rex* v. *Pritchard* (2) as meaning whether he is "of sufficient intellect to comprehend the course of proceeding on the trial so as to make a proper defence. . . . . If you think that there is no certain method of communicating the details of the trial to the prisoner,

(1) (1897) 104 L. T. Journ. 110. (2) 7 C. & P. 303, 304.

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so that he can clearly understand them, and be able properly to make his defence to the charge, you ought to find that he is not of sane mind." If the accused is found not fit to plead, he is not tried, but is detained during His Majesty's pleasure.

The authorities dealing with the matter are all discussed in the recent case of *Rex* v. *Governor of Stafford Prison.* (1) If the accused is fit to plead it may yet be that no communication can be made in the ordinary way; it may be that he is deaf and can only be approached by writing or signs, or dumb, and can only make his views known by writing or signs, or a foreigner who cannot speak English and requires the assistance of an interpreter to understand the proceedings and make answer to them. In such cases the judge must see that proper means are taken to communicate to the accused the case made against him and to enable him to make his answer to it. In the case of a foreigner ignorant of the English language who is undefended no difficulty has arisen in practice. The evidence is always translated to him by an interpreter.

The more difficult question arises when an accused foreigner, ignorant of the English language, is defended by counsel and no application is made to the Court for the translation of the evidence. There is no rule of law to be found in the books on the subject, and as a result of inquiry which we have made since the argument, it has become clear that the practice of the Courts in this respect has varied considerably during the last fifty years. It was stated at the bar by counsel for the Crown that the practice has been for the Court not to require the translation of the evidence unless the accused or his counsel applied for it. There is no doubt that this practice has been followed by some judges; whereas other judges have inquired at the outset of the trial whether the accused or his counsel wished the translation to be made, and if the answer was in the negative they have permitted the trial to proceed without having the evidence interpreted to the accused. Again, some judges have always insisted upon the translation except when the accused or his counsel stated that he did not wish it, and other judges have required translation notwithstanding such a statement. The only practice in this respect upon which there has been

(1) [1909] 2 K. B. 81.

uniformity is that whenever any desire has been manifested by the accused or his counsel for the translation it has always been permitted.

We have come to the conclusion that the safer, and therefore the wiser, course, when the foreigner accused is defended by counsel, is that the evidence should be interpreted to him except when he or counsel on his behalf expresses a wish to dispense with the translation and the judge thinks fit to permit the omission; the judge should not permit it unless he is of opinion that because of what has passed before the trial the accused substantially understands the evidence to be given and the case to be made against him at the trial. To follow this practice may be inconvenient in some cases and may cause some further expenditure of time; but such a procedure is more in consonance with that scrupulous care of the interests of the accused which has distinguished the administration of justice in our criminal Courts, and therefore it is better to adopt it. No injustice will be caused by permitting the exception above mentioned. Speaking generally, police court proceedings will have taken place and the evidence will there have been translated to the accused before he has to stand his trial on the indictment, so that at the trial he knows the case to be made against him. He can instruct his counsel upon it and he may leave his defence in counsel's hands without having the evidence again translated to explain to him that which he already knows, and there seems no reasonable objection to such a course. If there should be a substantial departure from the evidence recorded in the depositions the judge would take care, even if counsel omitted to ask it, that the variation or addition should be translated to the accused, so that he might throw any further light upon the case. The importance of the translation of any new or additional evidence cannot be doubted; such evidence may have a special significance to the accused and may enable him to recollect facts till then forgotten or to give additional information to his counsel for cross-examination. Further, he may wish to make a statement dealing with the evidence against him instead of himself giving evidence, and he should have all information for that purpose; or, again, the variation from or addition to the evidence originally given at the police court may have a bearing upon the sentence. We

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think, therefore, that any substantial variation from the story originally told in the depositions or any additional evidence should be translated to the accused, even though he may be indifferent upon the matter or may not wish it. It is not suggested in this case that any additional evidence could have been given or any light thrown upon the case had the evidence which in fact followed the depositions been again translated to the accused.

There is no authority in English law for the proposition that the omission to translate the evidence in the circumstances under consideration is an irregularity or is an irregularity which vitiates the proceedings. It is, however, to be noted that in *Reg.* v. *Lyons* (1) (known as "The Flowery Land" case), which was a prosecution for murder tried in 1864 before Bramwell B., the prisoners were foreigners who did not understand English, and were all represented by counsel. The prosecution was conducted by the Solicitor-General. The evidence was not interpreted, but upon the application of counsel for one of the prisoners the interpreter to the Spanish Consul was permitted to sit near them in order to communicate with the prisoners as the trial proceeded. That the practice was not uniform at that time is shown by another case tried on the same day in 1864 before Shee J. (*Reg.* v. *Boyden* (2)). The accused, who was deaf and dumb, was represented by counsel, and the evidence was interpreted to him. In 1872 Marguerite Dixblanc, a Belgian who did not understand English and was defended by counsel, was tried before Channell B. for murder. The evidence was interpreted to her. (3) In 1876 several foreigners who did not understand English and were defended by counsel were tried before Brett J. for murder on the high seas. The evidence was not interpreted to the prisoners. (4) In both of these cases the prosecution was conducted by the Law Officers. There are other cases in which the course pursued before Bramwell B. and Brett J. has been followed, and also others in which a different practice has prevailed. Mr. Beresford drew our attention to *Rex* v. *Kwok Leung* (5), where a similar question was

(1) (1864) 59 Cent. Crim. Ct. Sess. Papers, 275.

(2) (1864) 59 Cent. Crim. Ct. Sess. Papers, 293.

(3) (1872) 76 Cent. Crim. Ct. Sess. Papers, 103.

(4) (1876) 84 Cent. Crim. Ct. Sess. Papers, 37.

(5) 4 Hongkong L. R. 161.

considered by the Full Court, which is the equivalent of the Court for Crown Cases Reserved of that colony. That case is, of course, not binding upon us, but we have the advantage of the judgments of Piggott C.J. and Gompertz J., and have been impressed by their reasoning. We think, however, that the question whether there was an irregularity in the proceedings by reason of the omission to translate when the accused is defended by counsel is not a matter of law, but of practice, in our Courts, and that practice is not settled. In any event, we could not, as a matter of law, even apart from the considerations under s. 4 of the Criminal Appeal Act, 1907, hold that an irregularity had been committed at the trial which would justify the quashing of the conviction.

It is to be observed that there was no such power in the Hongkong Court as is given to this Court by virtue of the proviso to the 4th section of the Criminal Appeal Act, 1907.

The result is that this application must be dismissed.

Application dismissed.

Solicitors for appellant: *Ballantine, Clifford & Hett.*
Solicitor for the Crown: *Director of Public Prosecutions.*

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In re An Arbitration between WEIS & CO., LIMITED, and CRÉDIT COLONIAL ET COMMERCIAL (ANTWERP).

Sale of Goods—C.i.f. Contract—Payment against Shipping Documents—Outbreak of War before Tender of Documents—Seizure by Enemy of British Ship in which Goods carried—Place of Destination an Allied Port—Impossibility of Performance of Contract—Whether Buyers bound to accept Documents.

By a contract of sale made in June, 1914, the sellers sold to the buyers about 10,000 cases of bean oil shipped afloat from an Oriental port by steamer or steamers, direct or indirect, and with or without transhipment, at the price therein named, cost, freight, and insurance to Antwerp. The buyers were to pay the full amount of provisional invoice made out on net shipping weights by cash without discount against shipping documents on or before arrival of steamer or steamers in Antwerp or three months after notice of arrival of documents in London, whichever might happen first. In July, 1914, the sellers declared to the buyers in part fulfilment of the contract 3000 cases of bean oil which had been shipped on the *Glenearn*, a British vessel, for Antwerp, and rendered to the buyers provisional invoices showing the amount due computed in accordance with the contract. Early on August 4, 1914, war broke out between Belgium and Germany, and the following midnight between Great Britain and Germany. On August 5, 1914, the sellers notified the buyers in writing that the documents relating to the 3000 cases had arrived in London and asked for payment on August 27 in accordance with the contract. On August 18, 1914, the sellers tendered the shipping documents to the buyers. At that date Antwerp was still in possession of the Belgians. The ship had since war broke out been seized by the Germans and detained at Hamburg. The buyers did not take up the documents and contended that they were discharged from their obligation to do so by reason of the seizure of the ship by the Germans :—

Held, that as between the buyers and sellers there was no illegality in tendering documents calling for delivery at Antwerp, which at that time had not fallen. Nor was there any illegality in calling upon the shipowner to deliver at Antwerp, for if he could have got his ship there it would have been perfectly legal to do so, and the fact that it had become impossible did not prevent the tender of the documents from being valid.

Held, therefore, that the buyers were not discharged from their obligation to take up the documents.

Award stated by an umpire in the form of a special case.

The facts, so far as material to this report, were as follows :—By a contract dated June 23, 1914, Charles Weis & Co., Limited,

carrying on business in London and Antwerp (hereinafter called the "sellers"), sold to the Crédit Colonial et Commercial (Antwerp) (hereinafter called the "buyers") about 10,000 cases Manchurian and Japanese bean oil of fair average quality in cases containing two tins of about 37 lbs. each, shipped afloat from an Oriental port by steamer or steamers, direct or indirect, and with or without transhipment, at the price therein named, cost, freight, and insurance to Antwerp.

By clause 2 of the contract particulars of shipment, with date of bill or bills of lading marks and numbers of cases, if any, were to be duly declared by the original seller in writing with due despatch and under no circumstances later than the arrival of the steamer. Should the vessel arrive before receipt of appropriation and extra expenses be incurred, such expenses were to be paid by sellers. In case of resale, copy of original appropriation should be accepted by buyers if passed on without delay. Provisional invoice to be computed on net shipping weights. Each shipment to stand as a separate contract.

By clause 14 buyers were to pay the full amount of provisional invoice made out on net shipping weights by cash without discount against shipping documents on or before arrival of steamer or steamers in Antwerp or three months after notice of arrival of documents in London, whichever might happen first.

By clause 10 any dispute on the contract was to be settled by arbitration in London as soon as it might arise in accordance with the rules indorsed on the contract, such arbitration to be claimed within fourteen days from the final date of discharge.

By rule 1 indorsed on the contract any dispute arising out of the contract was to be referred to arbitration in London, each party appointing one arbitrator, and such arbitrators should have the power to appoint an umpire, whose decision in case of disagreement was to be final in the absence of appeal.

On or about July 3 and 10, 1914, the sellers declared to the buyers 1000 cases and 2000 cases respectively of bean oil (which had been shipped on or about May 11, 1914, on the steamship *Glenearn*, a British vessel, for Antwerp) in part fulfilment of the contract, and also rendered to the buyers provisional invoices showing the amount due computed in accordance with the contract.

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Early on August 4, 1914, war broke out between Belgium and Germany, and the following midnight (1) between Great Britain and Germany.

On or about August 5, 1914, the sellers notified the buyers in writing that the documents relating to 3000 cases of bean oil per steamship *Glenearn* had arrived in London and asking for payment on August 27 in accordance with the contract. There was some doubt whether the documents were ever in fact tendered by the sellers to the buyers, but for the purposes of the case the tender was to be taken as having been made on August 18, 1914. At that date Antwerp was still in possession of the Belgians. The *Glenearn* had since war broke out been seized and detained at Hamburg.

The buyers did not take up the documents and claimed that they were not a good tender as they did not comply with the provisions of the contract. The sellers on the other hand claimed that the tender was good.

The dispute was referred to arbitration in accordance with the terms of the contract, and the arbitrators having failed to agree appointed the umpire. Subject to the opinion of the Court, the umpire awarded that the tenders made by the sellers were good and that the buyers do forthwith take up the documents and pay to the sellers the sum of 2374*l.* 7*s.* 5*d.* in respect of the bean oil shipped on board the steamship *Glenearn.*

The question for the opinion of the Court was whether the buyers were discharged from taking up the documents in the case of the *Glenearn* by reason of her seizure by the Germans.

If the Court should answer the question in the affirmative the award was to be set aside, but if in the negative the award was to stand.

Leslie Scott, K.C., and *Stuart Bevan*, for the sellers. The tender of the shipping documents was valid and the buyers were bound under the c.i.f. contract to pay against it. A c.i.f. contract is a sale of the documents.

(1) Collected Diplomatic Documents, 1915, Nos. 153, 159, 160. The first date was wrongly given as July 31 in the special case. The variance is immaterial to the question before the Court.

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Maurice Hill, K.C., and *Douglas Hogg*, for the buyers. As the *Glenearn* was detained at Hamburg the tender of the documents was bad. The bill of lading involved some dealing with the enemy in Hamburg and was therefore void. Delivery of the goods at Antwerp under the bill of lading could not have been obtained without dealing with the enemy, for they would have had to be transhipped. In *Esposito* v. *Bowden* (1), where the contract was held to be rescinded by the declaration of war, the illegality was very slight. [*Duncan, Fox & Co.* v. *Schrempft & Bonke* (2) and *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (3) were also referred to.]

Stuart Bevan in reply. *Duncan, Fox & Co.* v. *Schrempft & Bonke* (2) is distinguishable. In that case the respondents by accepting the documents and obtaining the goods would have been carrying out a contract in violation of a Royal proclamation against trading with the enemy. The buyer could not have called upon the shipowner to deliver at Hamburg because that would have been illegal. But in the present case the shipowner by the bill of lading undertook to deliver at Antwerp. The buyer could enforce that contract against the shipowner, who would not have been able to set up any defence of illegality of the contract. The decision in *Duncan, Fox & Co.* v. *Schrempft & Bonke* (2) was based upon the ground that to tender the bill of lading would be to tender a contract the performance of which would be illegal. But in the present case there would be nothing illegal in the performance of the contract contained in the bill of lading. The parties to the contract of sale were a British subject and a Belgian subject (i.e., an allied subject). The shipowner was British, and Antwerp not having fallen on August 18 was not in German occupation. [*Groom* v. *Barber* (4) and *In re Olympia Oil and Cake Co. and Produce Brokers Co.* (5) were also referred to.]

BAILHACHE J., having stated the facts, continued: The question I am asked with regard to the *Glenearn* is whether the buyers were discharged from taking up the documents by reason of her seizure

(1) (1857) 7 E. & B. 763.
(2) [1915] 3 K. B. 355.
(3) [1915] 2 K. B. 379.
(4) [1915] 1 K. B. 316.
(5) [1915] 1 K. B. 233.

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by the Germans. The *Glenearn* was, and of course after the outbreak of war continued to be, an English ship, but unfortunately before the documents were tendered she was seized somewhere on the high seas—I do not know where—and taken to Hamburg, so that at the time the documents were tendered to the buyers the contract between them and the sellers had become impossible of performance by reason of the seizure of the ship with the cases of oil on board. The question is whether that seizure made the tender of the documents bad. On behalf of the buyers it was contended that the tender was bad upon the ground that it involved trading with the enemy, namely, transhipment of the oil from Hamburg to Antwerp. I have come to the conclusion that the tender was good notwithstanding the fact that the *Glenearn* had been seized and was taken into Hamburg. It is quite true that at the time of the tender the contract had become impossible of performance by reason of the seizure of the ship, but the question is whether there was any illegality as between the parties to the contract. As between the buyers and sellers there was no illegality in tendering documents which called for delivery at Antwerp, which at that time had not fallen and was still in possession of the Belgians. Nor was there any illegality in calling upon the shipowner to deliver at Antwerp, for if he could have got his ship there it would have been quite a legal thing to do. In my judgment the fact that it became impossible to perform the contract did not prevent the tender of the documents from being valid. The real origin of the objection by the buyers to the tender was that the policy of insurance which the sellers offered contained the usual f. c. and s. clause, and it therefore gave the buyers no opportunity of recovering the insurance money from the underwriters, and they were not in the least likely to obtain delivery of the oil. But it appears to me that those matters do not help the buyers. Although what happened was most unfortunate for them, it gives them no right to decline to pay. The *Glenearn* sailed before the war broke out, and it was therefore obviously sufficient for the sellers to procure a policy containing the f. c. and s. clause. If the buyers desired protection against war risks it was open to them to take out a war risks policy. I should hesitate to say that the buyers ought to do that in a case where they are unaware of

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the identity of the ship on which their goods are loaded or where she is, but in the present case the buyers had notice early in July that the particular vessel which was carrying their oil was the *Glenearn*, and they had the opportunity, if they had been so minded, to cover themselves against war risks. The mere fact that the goods had in the meantime been seized by the Germans did not release them from their liability. In my judgment the umpire's decision is right, and I answer the question by saying that the buyers were not discharged from taking up the documents by reason of the seizure of the *Glenearn* by the Germans.

Award upheld.

Solicitors for sellers: *Waltons & Co.*
Solicitors for buyers: *Armitage, Chapple & Macnaghten.*

J. E. A.

[IN THE COURT OF APPEAL.]

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JONES *v.* JONES AND WIFE.

Slander—Cause of Action—Words imputing Moral Misconduct—Not spoken of Plaintiff in Relation to his Calling—Head Teacher of Council School—No Special Damage alleged or proved.

An imputation of immorality against a person engaged in any profession or occupation in which a good moral character is specially requisite is not actionable per se, unless the imputation itself be connected with the person's occupation or employment, or the person slandered be a clergyman holding clerical preferment or employment of temporal profit. To hold to the contrary would be an extension of the law of slander, which must be made by the Legislature and not by judicial decision.

So *held* in the case of the headmaster of a council school, against whom an imputation that he had been guilty of adultery was made, without any relation to his position as a schoolmaster.

APPEAL from a decision of Lush J. upon the further consideration of an action tried by him with a jury at Carnarvon Assizes.

The action was brought by David Jones, a certificated teacher and headmaster of the Llidiardan Council school, Carnarvonshire, to

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which post he had been appointed by the Carnarvon County Council. He held the office on the customary terms that the council had power to remove him by giving a term's notice, or, if they had good cause, they could dismiss him without notice. He brought the action against Hugh Jones and Ellen Jones, his wife, to recover damages for a slander uttered concerning him in the way of his business by the female defendant. The words spoken were in the Welsh language, and it was admitted that the substance of them was that the plaintiff had been guilty of moral misconduct with a certain Mrs. Roberts. At the time of speaking the words complained of no reference was made by the defendant to the fact of the plaintiff being a schoolmaster, nor was it proved that the person to whom the slander was uttered was aware of the position occupied by the plaintiff. The defendants denied publication, and further pleaded that, even if the words were spoken and published of and concerning the plaintiff, they did not impute to him misconduct in the course of discharging the duties of his office as a schoolmaster, and consequently that the words spoken were not spoken of him in relation to his office, and were therefore not actionable without proof of special damage, of which there was none. Lush J. at the trial left the following questions to the jury, to which they returned the answers appended :—

Did the words spoken by the female defendant impute moral misconduct between the plaintiff and Mrs. Roberts ?—A. Yes. Were the words spoken of the plaintiff in the way of his calling—that is, in such a way as to imperil the retention of his office ?—A. Yes. Did they impute that he was unfit to hold his office ?—A. Yes.

The jury assessed the damages at 10*l.*

Lush J. reserved further consideration upon the question whether the words spoken were actionable without proof of special damage, and after hearing argument upon this point he came to the conclusion that the words spoken of the plaintiff, being calculated to imperil the retention by him of his office, were actionable per se although the defendant in uttering them did not refer to the plaintiff as being a schoolmaster, and although it did not appear that she knew that he held that office. The learned judge accordingly gave judgment for the plaintiff. The defendants appealed.

Greer, K.C., and *Artemus Jones*, for the appellants. No special damage having been proved in this case, it is submitted that the words uttered were not actionable per se. From the commencement of the nineteenth century down to the present time it has always been held that in the absence of proof of special damage a slander to be actionable must be uttered in relation to the plaintiff's business or profession. In a case referred to in *Wharton* v. *Brook* (1) it was held that a charge of immorality against a schoolmistress was not actionable. We do not, however, rely on that case, as the early decisions are somewhat conflicting. But from the commencement of the nineteenth century down to the present time there has been a consistent current of authority showing that the slander complained of must be in relation to the conduct of the plaintiff in his business or profession. The form of plea is given in Bullen and Leake's Precedents in Pleadings, 3rd ed., p. 308.

The case of *Best* v. *Loit* (2) is against us. That was the case of a scrivener where the words "He is a broken run-away, and dares not show his face" were held actionable per se.

[SWINFEN EADY L.J. The point in that case was that in those days only traders could be made bankrupt.]

In *Lumby* v. *Allday* (3) it was held that words to be actionable as spoken of a man in his office must be spoken of him in reference to his character or conduct in such office, and must impute to him the want of some qualification for, or misconduct in, his office. In *Ayre* v. *Craven* (4) it was held that to impute adultery to a physician was not actionable per se unless the adultery was alleged to have been committed in the course of his profession. In *Doyley* v. *Roberts* (5) the words "He has defrauded his creditors and has been horsewhipped off the course at Doncaster" spoken of an attorney were held not to be actionable unless spoken of him in relation to his profession.

A distinction is to be drawn between an allegation of specific acts of immorality and a general allegation that a person is an immoral character. In *Brayne* v. *Cooper* (6) it was held that words spoken

(1) (1669) 1 Vent. 21.
(2) (1661) 1 Roll. Abr. p. 59, case 6; 1 D'Anvers' Gen. Abr. p. 122.
(3) (1831) 1 Cr. & J. 301.
(4) (1834) 2 Ad. & E. 2.
(5) (1837) 3 Bing. N. C. 835.
(6) (1839) 5 M. & W. 249.

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of a tradesman imputing to him that his trade was maintained by the prostitution of a female employed by him were not actionable (although laid to be spoken of him in his trade) unless they could be construed as imputing that he kept a bawdy-house. In *Pemberton* v. *Colls* (1), where the plaintiff was a clergyman, it was held that the first count of the declaration was good because the words there set forth reflected upon him in his profession. In *Gallwey* v. *Marshall* (2) it was held that no action would lie for a verbal imputation of incontinence in a clergyman unless he was beneficed or held some clerical office or employment of temporal profit.

In the present case it is submitted that there was no evidence that the words complained of were spoken of the plaintiff in reference to his profession as a schoolmaster. In order to make the words actionable they must amount to a statement that the plaintiff is lacking in some general quality necessary for the exercise of his profession.

Special damage must be proved except in the three following cases: (1.) where the words impute a criminal offence; (2.) where the words impute to the plaintiff some infectious disorder which prevents him from associating with his fellows; and (3.) where the words impute to the plaintiff misconduct in relation to his business or profession.

The Court has always looked with jealousy on slander cases where no money damage has resulted.

In all the cases, other than the case of a clergyman in which an action for slander has succeeded without proof of special damage, there has been something either in the language used or in the circumstances surrounding the case which connected the slander with the plaintiff's business or profession. The test is indicated by A. L. Smith M.R. in *Dauncey* v. *Holloway* (3), where he said that Wright J. "was right in holding that the words complained of are not reasonably capable of being taken as conveying an imputation of unfitness in the plaintiff to carry on his business as a solicitor. I do not think that we can say that the words are reasonably capable of conveying an imputation on the plaintiff in his character as a

(1) (1847) 10 Q. B. 461. (2) (1853) 9 Ex. 294.
(3) [1901] 2 K. B. 441, 446.

solicitor, and, that being so, in the absence of special damage the action is not maintainable."

Special damage means actual damage. If a plaintiff can prove that he has suffered any, then he can recover. No injustice is brought about by this rule, because if a plaintiff can prove that he has suffered actual loss, then he has his remedy.

Though there may have been some conflict in the old cases, it is now well settled that the words spoken are not actionable unless they contain reference to the plaintiff's profession or business, or unless they contain allegations of a general lack of the characteristics which fit him for his calling. Here there is no evidence, nor is anything alleged in the statement of claim which constitutes a nexus between the spoken words and the plaintiff's calling.

Montgomery, K.C., and *T. E. Morris*, for the respondent. It cannot be disputed in this case that the words used were calculated to prejudice the plaintiff in his office, because an imputation of adultery against a person in his position would probably lead to his dismissal. It is submitted that a slander is actionable without proof of special damage (1.) if the allegation is of some fact which, if true, would be a disqualification for a position of profit occupied by the plaintiff; (2.) if the natural and proper presumption in fact is that the allegation under the circumstances in which it is made will lead to the plaintiff's loss of a position by which he earns his living; (3.) if the words touch, i.e., injuriously affect, the plaintiff in his profession or in the post which he occupies, or if they are in disgrace of his profession or position.

Bayley B. in *Lumby* v. *Allday* (1) said: "Every authority which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business." The first part of that applies to the plaintiff's case. The words of the slander impute that he is lacking in morality, which is essential in a teacher and trainer of youth. Words imputing insolvency to a trader in his private capacity are actionable without proof of special damage, because they must necessarily affect him in his trade: *Stanton* v. *Smith*. (2) Here the words complained of are equally actionable because they must necessarily damage the plaintiff in his vocation.

(1) 1 Cr. & J. 305. (2) (1726) 2 Ld. Raym. 1480.

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In the case of a person holding an office, if the allegation be such that, if true, it would afford a ground for his dismissal, the slander is actionable without proof of special damage. It is not actionable if it merely prevents the plaintiff from obtaining a position of profit. *Wood* v. *Barney* (1) clearly shows the distinction.

[SWINFEN EADY L.J. referred to *James* v. *Brook*. (2)]

If the imputation made upon the plaintiff be such as will afford no ground for dismissing him from his office, then the action is not maintainable in the absence of special damage: *Alexander* v. *Jenkins* (3); but that is not this case.

[SWINFEN EADY L.J. The office held by the plaintiff there was one strictly of honour and not of profit. See Odgers on Libel and Slander, 5th ed., p. 72.]

In *Connors* v. *Justice* (4) defamatory words spoken of a female domestic servant in relation to her employment were held actionable per se. In *Speake* v. *Hughes* (5) the plaintiff alleged that in consequence of the words spoken he had been dismissed by his employers from his post as barman, and it was held that the action would not lie, the damage being too remote.

[SWINFEN EADY L.J. Is there any case where the plaintiff has succeeded when immoral conduct has been imputed to him not in relation to his employment?]

We have not been able to find any. The authorities are dealt with in *Brandrick* v. *Johnson* (6), which is referred to in Odgers on Libel and Slander, p. 59. See also Cooke on Defamation (ed. 1844), p. 18.

Artemus Jones in reply. There was no evidence here that the words were spoken of the plaintiff with reference to his position as a schoolmaster. The fallacy in the plaintiff's argument lies in treating his employment as a public office requiring certain recognized qualifications: Odgers on Libel and Slander, p. 55. The position of a council schoolmaster is not a public office in that sense. The limits of actions of this nature ought not to be extended beyond those hitherto generally accepted. If such an extension is to be made it

(1) *The Times*, May 5, 1913.
(2) (1846) 9 Q. B. 7.
(3) [1892] 1 Q. B. 797.
(4) (1862) 13 Ir. C. L. R. 451.
(5) [1904] 1 K. B. 138.
(6) (1875) 1 Vict. L. R. C. L. 306.

must be done by the Legislature. If *Ayre* v. *Craven* (1) be good law the plaintiff cannot succeed. It is admittedly a hard case, but the hardship is shared by the whole community.

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Cur. adv. vult.

Dec. 9. SWINFEN EADY L.J. read the judgment of the COURT (Swinfen Eady and Warrington L.JJ. and Bray J.). This is an action for slander tried before Lush J. and a common jury at Carnarvon, and a verdict was found for the plaintiff for 10*l.*, and he obtained judgment. The defendants appeal and contend that judgment ought to be entered for them.

The plaintiff is a certificated teacher, and the senior master of a council school near Pwllheli in the county of Carnarvon. The defendant Hugh Jones is a labourer, and the other defendant is Ellen Jones, his wife, who uttered the slander.

The words spoken were in the Welsh language. The English translation, with the innuendo, is thus set out in the statement of claim: "The exact meaning in English of the said words is as follows: 'Have you heard that Mr. David Jones is courting with Mrs. Ellen Roberts?' 'Mrs. Roberts has told me that Mr. David Jones had been conducting himself improperly with her,' meaning thereby that the plaintiff had been guilty of adultery with the said Mrs. Ellen Roberts and that he was unfit to hold office as headmaster as aforesaid or any office in his profession as certificated teacher. The said words were spoken and published by the female defendant in the Welsh language to Miss Elizabeth Jones, of Glamrfon, Rhydlios, Rhodhirwaen, Pwllheli, on a day in the early part of May, 1914, which the plaintiff cannot at present more particularly indicate. Mrs. Ellen Roberts is a married woman living with her husband, who is employed by the cleaner of the said schools." The person to whom the words complained of were spoken (Miss Elizabeth Jones) was not aware that Mrs. Roberts did some cleaning in the school. An attempt was made to connect the imputation with the plaintiff's occupation or employment, but this attempt failed, as, indeed, the plaintiff concedes. No special damage was proved or even alleged. The jury found in answer to the first question put to them by the judge that words were spoken by the defendant Mrs. Jones of the

(1) 2 Ad. & E. 2.

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plaintiff imputing moral misconduct between the plaintiff and Mrs. Roberts.

The question is whether the words spoken are, under the circumstances, actionable without special damage. The plaintiff's contention is that the words of themselves contain a defamation of him in relation to his occupation of teacher and his position of master in a county council school, although not spoken with reference to his occupation or position and having no reference to his conduct in that capacity. He put the case in this way. The slander imputes that the plaintiff is deficient in a quality necessary for a teacher and trainer of youth to possess, namely, correctness and propriety of moral behaviour, that such qualification is as necessary to a schoolmaster as credit to a trader, that the case of *Stanton* v. *Smith* (1) shows that if words are spoken of a person who is a trader, imputing insolvency to him, although spoken of him in his private character, yet such words are actionable without proof of special damage, as they must necessarily affect him in his trade.

Upon the same principle it is said the words complained of here are actionable, as they must necessarily damage and injure the plaintiff in his vocation. And the plaintiff claimed that his case fell within the first limb of the passage, so frequently quoted, in the judgment of the Court of Exchequer delivered by Bayley B. in *Lumby* v. *Allday* (2): "Every authority which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business." The plaintiff contended that imputing moral misbehaviour to him was alleging "the want of some general requisite," and that in principle no distinction could be drawn between his case and imputing insolvency to a person who is a trader, though spoken of him in his private capacity.

If the Court were at liberty to deal with this case upon principle, there would be much to be said in favour of this view; but the law of slander is an artificial law, resting on very artificial distinctions and refinements, and all that the Court can do is to apply the law to those cases in which heretofore it has been held applicable. It is not like a law founded on settled principles, where the Court applies established principles to new cases, as they arise, which fall

(1) 2 Ld. Raym. 1480. (2) 1 Cr. & J. 305.

within them. In *Alexander* v. *Jenkins* (1) Lord Herschell said: "I feel very strongly in this case what was said by Pollock C.B. in delivering the judgment of the Court in the case of *Gallwey* v. *Marshall* (2), that we ought not to extend the limits of actions of this nature beyond those laid down by our predecessors. When you are dealing with some legal decisions which all rest on a certain principle, you may extend the area of those decisions to meet cases which fall within the same principle; but where we are dealing with such an artificial law as this law of slander, which rests on the most artificial distinctions, all you can do is, I think, to say that if the action is to be extended to a class of cases in which it has not hitherto been held to lie, it is the Legislature that must make the extension and not the Court."

Again in *Dauncey* v. *Holloway* (3) the Master of the Rolls said: "I feel that if we were to accede to the argument which has been pressed strongly upon us on behalf of the plaintiff we should be relaxing the very salutary rule laid down in olden times restricting actions of slander, where no special damage is proved, to a very limited number of cases, and we should be opening the door to many actions of this kind. I am not myself prepared to do that." And Vaughan Williams L.J. said (4): "I have nothing to add to Wright J.'s judgment except this—that when our ancestors years ago drew the distinction between libel and slander they exercised that kind of wise discretion which they always exercised over the whole field of the common law. It would, to my mind, be very dangerous for us nowadays to relax in any way the rule of law which confined actions for spoken words, in the absence of proof of special damage, to a very limited number of cases." The slander in that case was: "They tell me our neighbour here" (meaning Mr. Dauncey, a solicitor) "has gone for thousands instead of hundreds this time." It was held by Wright J. that the words were not reasonably capable of being construed as conveying an imputation on the plaintiff in his business as a solicitor, that the expression "gone for thousands" was not reasonably capable of being construed as imputing to the plaintiff misconduct or incapacity in his profession or business as a solicitor, and that the innuendo attached

(1) [1892] 1 Q. B. 797, 801.
(2) 9 Ex. 294.
(3) [1901] 2 K. B. 441, 447.
(4) Ibid. 448.

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by the statement of claim to the words used was not pointed to bankruptcy. The judge added (1): "Supposing even that the plaintiff had been adjudicated a bankrupt, that of itself would not establish that he was unfit to carry on his business as a solicitor"; and this "excellent judgment" of Wright J. was approved in the Court of Appeal. It proceeded upon the lines of decided cases; and yet upon principle there was much to be said in favour of the view that such words were necessarily calculated to injure a solicitor in his profession as tending to make people distrust him and so affecting his credit.

It must always, however, be borne in mind that the only question in the class of case of which *Dauncey* v. *Holloway* (2) is an example is whether a plaintiff can recover for words spoken without proof of having suffered any damage. Wherever a plaintiff can show that he has in fact suffered damage, which is not in law too remote, by reason of false defamatory words spoken of him, without lawful occasion, he may recover. In our opinion words imputing adultery, profligacy, immoral conduct, or the like, whether referring to behaviour on a particular occasion or to conduct in general, even when spoken of a man holding an office or carrying on a profession or business, are not actionable without special damage unless they relate to his conduct in the office, profession, or business, or the imputation is connected with his professional duties. Thus, to say of a physician that he had debauched a lady patient would be actionable per se. But to say that he had committed adultery, or was the defendant in an action of criminal conversation, or was of general immoral behaviour would not be actionable per se: *Ayre* v. *Craven*. (3) Lord Denman, in delivering the judgment of the Court of King's Bench, there said: "Some of the cases have proceeded to a length which can hardly fail to excite surprise; a clergyman having failed to obtain redress for the imputation of adultery; and a schoolmistress having been declared incompetent to maintain an action for a charge of prostitution. Such words were undeniably calculated to injure the success of the plaintiffs in their several professions; but not being applicable to their conduct therein, no action lay."

(1) [1901] 2 K. B. 444. (2) [1901] 2 K. B. 441.
(3) 2 Ad. & E. 2.

It is well settled that words spoken, although calculated to injure a person in his profession, vocation, or office, but not relating to his conduct or capacity therein, are not actionable per se: *Lumby* v. *Allday* (1); *Ayre* v. *Craven* (2); *Doyley* v. *Roberts* (3); *James* v. *Brook.* (4) These are strong and clear authorities and have been constantly acted upon, and are part of the law of the land.

In *Doyley* v. *Roberts* (3) the jury found that the words spoken had a tendency to injure the plaintiff morally and professionally, but as they were not spoken of him in his profession of an attorney they were held not actionable per se.

In *Alexander* v. *Jenkins* (5) Lord Herschell said that with regard to a man's business, profession, or any office of profit the defamation, to be actionable per se, must be either "something said of him in his office or business which may damage him in that office or business, or it must relate to some quality which would shew that he is a man who, by reason of his want of ability or honesty, is unfit to hold the office. So much with regard to offices of profit; the reason being that in all those cases the Court will presume, or perhaps I should rather say the law presumes, such a probability of pecuniary loss from such imputation, in that office, or employment, or profession, that it will not require special damage to be shewn. It may be said to be an arbitrary rule. Be it so; but the rule is, at all events, laid down, and seems to me to rest on that basis."

The imputation of insolvency upon a person who is in fact a trader, whether he is a trader within the meaning of the bankruptcy laws or not, not made against him in that capacity, but in his private capacity, is actionable per se. This is well established, although an exceptional case: *Best* v. *Loit* (6); *Read* v. *Hudson* (7); *Stanton* v. *Smith* (8); *Whittington* v. *Gladwin* (9); *Jones* v. *Littler.* (10) Perhaps this exceptional case arose from the fact that the law has always been very tender of the reputation of tradesmen, and guards most carefully the credit of all merchants and traders. Again, to impute incontinence to a clergyman, who is beneficed or holds some clerical

(1) 1 Cr. & J. 301.
(2) 2 Ad. & E. 2.
(3) 3 Bing. N. C. 835.
(4) 9 Q. B. 7.
(5) [1892] 1 Q. B. 797, 800.
(6) 1 Roll. Abr. 59.
(7) (1700) 1 Ld. Raym. 610.
(8) 2 Ld. Raym. 1480.
(9) (1826) 5 B. & C. 180.
(10) (1841) 7 M. & W. 423.

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office or employment of temporal profit, is actionable per se, as being a cause of deprivation or degradation.

It would, however, be an extension of the law, opening the door to a wide field of actions, to hold that an imputation of immorality against a man in his personal capacity was actionable per se if he were engaged in any profession or occupation in which a good moral character was specially requisite. Any such extension must be made by the Legislature, and not by judicial decision. The Legislature, by the Slander of Women Act, 1891, has already dealt with words imputing unchastity or adultery to any woman or girl. Although an aspersion on a person's moral behaviour is one of the commonest forms of slander, there is no single case of its ever having been held actionable per se, unless the imputation itself be connected with the person's occupation or employment, or the person slandered be a clergyman holding clerical preferment or employment of temporal profit. Instances to the contrary have been already referred to.

In our opinion there was no evidence to leave to the jury upon the first portion of question 2, namely, whether the words were spoken of the plaintiff in the way of his calling; and even if there were evidence to support the findings of the jury upon the remainder of question 2 and upon question 3, such findings are irrelevant and do not make the words actionable per se.

In our judgment the appeal should be allowed and judgment entered for the defendants with costs here and below.

Appeal allowed.

Solicitors: *Rhys Roberts & Co., for Lloyd-George & George, Criccieth; Baker & Nairne.*

G. A. S.

ATKINSON *v.* LEWIS MERTHYR CONSOLIDATED COLLIERIES, LIMITED.

1915
Dec. 15.

Coal Mine—Mine not managed in Conformity with Act—Liability of Owner—Taking Part in Management of Mine—Coal Mines Act, 1911 (1 & 2 *Geo.* 5, *c.* 50), *s.* 31, *sub-s.* 3; *s.* 101, *sub-s.* 2; *s.* 102, *sub-s.* 1 (*a*).

By s. 2, sub-s. 1, of the Coal Mines Act, 1911, "Every mine shall be under one manager, who shall be responsible for the control, management, and direction of the mine."

By s. 31, sub-s. 3, "After the first day of January, 1913, or such later date as, in view of the circumstances of the mine, may be fixed by the inspector of the division, there shall, in every mine in which a mechanical contrivance for ventilation is used, be provided and maintained in a condition to be put into immediate operation adequate means for reversing the air current."

By s. 101, sub-s. 2, "If a mine is not managed in conformity with this Act, the owner . . . . thereof shall . . . . be deemed to be guilty of an offence against this Act."

By s. 102, sub-s. 1, "Where proceedings are taken under this Act against the owner . . . . the owner . . . . shall not be liable to any penalty if he proves" (inter alia) "that he . . . . did not in respect of the matters in question take any part in the management of the mine."

The owners of a mine to which s. 31, sub-s. 3, applied instructed their manager to apply to the inspector of the division for an extension of time in which to comply with the requirements of that section, and the inspector allowed the extension. The manager consulted the owners as to the scheme to be adopted for the purpose of satisfying those requirements. Save as aforesaid the owners took no part in the management of the mine. On the expiry of the time as so extended the scheme which had been adopted was uncompleted, and the mine was still without adequate means for reversing the air current. The owners having been summoned under s. 101, sub-s. 2:—

Held by Ridley and Avory JJ., Lush J. dissenting, that they had taken part in the management of the mine in respect of the matters in question and could not claim the protection of s. 102, sub-s. 1, and were consequently guilty of the offence charged.

Case stated by justices of Glamorganshire.

The respondent company were summoned upon an information charging that they being the owners of the Senghenydd Universal Colliery did on October 14, 1913, fail to provide and maintain in

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a condition to be put into immediate operation adequate means for reversing the air current at the said mine, contrary to s. 31, sub-s. 3, of the Coal Mines Act, 1911.

At the hearing the following facts were proved or admitted :—

1. The Lewis Merthyr Consolidated Collieries, Limited, were at all material times the owners of the Senghenydd Universal Colliery in the county of Glamorgan.

2. W. T. Rees was at all material times the managing director of the said company.

3. On April 25, 1913, E. Shaw, the manager of the said mine, wrote to the appellant, W. N. Atkinson, one of His Majesty's inspectors of mines, asking for six months' extension of the time within which to comply with the said sub-s. 3 of s. 31.

4. On May 17, 1913, the appellant wrote asking for the reason for such application, and in reply received the following letter :—

" Dear Sir,—I have your letter asking for my reason for applying for an extension of time to put the provisions of the Mines Act in force with reference to the reversal of the air current. Mr. W. T. Rees instructed me to apply for the extension of time as, though we had considered several schemes, they were all costly and difficult and we were doubtful as to their efficiency. Mr. Rees therefore thought that a little more time was necessary to enable us to decide on the best method. (Signed) E. Shaw."

5. On September 16, 1913, an extension of time was granted by the following order which was served upon the respondents on the same date :—

" Senghenydd Universal Colliery.

" In pursuance of s. 31, sub-s. 3, and in view of the circumstances of the above named mine, I hereby fix September 30, 1913, as the date after which there shall in the mine be provided and maintained in a condition to be put into immediate operation adequate means for reversing the air current. (Signed) W. N. Atkinson."

6. On October 14, 1913, the means for immediately reversing the air current had not been completed, and it was admitted by the manager that on that date it would have taken two or three hours to reverse the air current.

7. The directors of the company took no part, nor did they interfere, in the management of the mine.

8. The respondents had appointed a competent manager, namely, the said E. Shaw, who was also agent, and he had the sole control, management, and direction of the colliery.

9. The respondents made all financial and other provisions necessary to enable the manager to carry out his duties.

10. The said W. T. Rees was consulted by the manager as to the scheme to be adopted for immediately reversing the air current, but, that scheme having been decided upon, the said W. T. Rees did not interfere with the progress of the work, and the details of such work did not come before the directors of the company.

11. W. T. Rees occasionally asked Shaw how the work under the scheme was progressing, and Rees knew the work was being carried on.

12. Rees knew that as part of the scheme a wall connected with the existing system had to be knocked through, but he did not know whether the hole had been knocked through or not.

13. . . . . .

14. The offence alleged, so far as it was proved, was committed without the knowledge, consent, or connivance of the respondents.

15. The Coal Mines Act, 1911, and the Regulations made thereunder were duly published at the colliery.

16. The respondents took all necessary steps to enforce the said Act and Regulations.

The justices were of opinion that the respondents had satisfied the provisions of s. 75 and s. 102, sub-s. 1, so as to exempt them from liability for the offence charged, and accordingly dismissed the information.

On the hearing of the appeal in the King's Bench Division the Divisional Court was not satisfied that the facts had been sufficiently stated and ordered the case to be remitted to the justices, who in answer to certain questions from the Court found the following additional facts :—

1. The precise date when the scheme was adopted could not be given, but it was three or four months before October 14, 1913.

2. The work was commenced immediately upon the adoption of the scheme.

3. Mr. Rees was first consulted some time before May 23, 1913, and he was not consulted after the scheme had been finally decided upon.

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4. After the scheme had been adopted Mr. Rees exercised no discretion or control except in reference to the cost and the financial provision to be made.

5. There was no evidence as to when Rees last made any inquiry of the manager how the work was progressing, nor was there any evidence that he knew after September 30 that the hole had not been knocked through.

6. It was left entirely to the manager Shaw to carry out the scheme which had been decided upon, and Rees did not know whether the work had been done or not.

The evidence on which the justices had found that the respondents had taken all necessary steps to enforce the Act and Regulations was (*a*) that the respondents had appointed a competent qualified person to manage the mine; (*b*) that they at all times made all financial and other provisions to enable the manager to carry out his duties; and (*c*) that an abstract of the Act and the Regulations were duly published at the colliery.

Ivor Bowen, K.C., and *Clement Edwards*, for the appellant. The letter of May 17, 1913, showing that it was on Rees' instructions that the manager of the mine wrote to the inspector for an extension of time, and that Rees had the determining voice on the question of the kind of scheme that should be adopted for reversing the air current, establishes that Rees, and consequently the respondents whom he represented, took part in the management of the mine in respect of the matters in question, within the meaning of s. 102. (1) The justices wrongly thought that it was enough to absolve the respondents from liability that Rees, after having decided upon the

(1) By s. 102, sub-s. 1, of the Coal Mines Act, 1911, "Where proceedings are taken under this Act against the owner . . . . of a mine in respect of an offence under this Act for which the owner . . . . is liable under this Act, the owner . . . . shall not be liable to any penalty if he proves to the satisfaction of the Court—(*a*) that he was not in the habit of taking and did not in respect of the matters in question take any part in the management of the mine; and (*b*) that he had made all the financial and other provision necessary to enable the manager to carry out his duties; and (*c*) that the offence was committed without his knowledge, consent, or connivance."

particular scheme, left it to a competent manager to carry out the work.

Disturnal, K.C., and *Lincoln Reed*, for the respondents. The time for compliance with s. 31 having been extended by the inspector up to September 30, there was no default before that date. And the justices found that after the date when the scheme was adopted, which was long anterior to September 30, Rees exercised no discretion or control in the matter. What happened before that date is immaterial. What s. 102 aims at is a taking part in the management by the owner at a time when the mine is in default. But even if a taking part in the management before September 30 would bind the owners, they did not here take any such part. As they had to find the money, the manager was bound to consult them about the scheme. All that Rees did was incidental to provision for the cost.

Ivor Bowen, K.C., in reply.

RIDLEY J. This case comes before the Court again for a rehearing upon the answers of the justices to certain questions asked of them by the Court. An information was preferred against the owners of a colliery for failure to provide and maintain in a condition to be put into immediate operation adequate means for reversing the air current in the mine as required by s. 31, sub-s. 3, of the Coal Mines Act, 1911. The question for us to determine is whether under the circumstances the owners are responsible for that failure. On April 25, 1913, a Mr. Shaw, the manager of the mine, applied for six months' extension of time for compliance with the requirements of the section, and he did so upon the instructions of Mr. Rees, the managing director, who, it is admitted, represented the owners. Shaw and Rees consulted together about the scheme to be adopted for the purpose. They considered a variety of schemes, which were all costly and difficult to carry out, and Rees wanted further time before arriving at a decision. Eventually the time was extended to September 30, but on October 14, the date mentioned in the summons, the work had not been completed. Now was Rees responsible for that? Paragraph 7 of the case states that the directors took no part or interfered in the management of the mine. But that, if read literally, seems to be in direct conflict

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Ridley J.

with the statements in the letter of May 17, and I think must be understood as meaning that they did not as a general rule take any part in the management. Then in par. 4 of the justices' answers to the Court's questions they say that "after the scheme had been adopted Mr. Rees exercised no discretion or control." But that seems to me to be immaterial, if he exercised such control before its adoption. The Act provides by s. 101, sub-s. 2, that "If a mine is not managed in conformity with this Act, the owner . . . . thereof shall . . . . be deemed to be guilty of an offence," and it is clear that if adequate means for reversing the air current are not provided the mine is not being managed in conformity with the Act. In such a case prima facie the owner is guilty of an offence. But he is given a means of escape if he can show that he has satisfied the provisions of s. 102, sub-s. 1; that is to say, "(*a*) that he was not in the habit of taking and did not in respect of the matters in question take any part in the management of the mine; (*b*) that he had made all the financial and other provision necessary to enable the manager to carry out his duties; and (*c*) that the offence was committed without his knowledge, consent, or connivance." Here the justices find that he did make all the necessary financial provision. They also find that the offence was committed without the owners' knowledge, consent, or connivance. But I do not think it can be said that Rees did not take part in the management of the mine in respect of the matters in question. I am of opinion, therefore, that the respondents did not satisfy sub-s. 1 (*a*), and that the decision of the justices was consequently wrong.

AVORY J. I agree. The justices in the original case stated that in their opinion the respondents had satisfied the provisions of ss. 75 and 102, so as to exempt them from liability, and on those grounds dismissed the information. On the argument to-day not a word has been said about s. 75, and probably for the very good reason that it has no application to this case at all. It is intended to deal with offences committed by the miners and workmen. We have now only to deal with s. 102, bearing, however, in mind that the justices may have been misled into deciding as they did by reference to s. 75. In answer to the questions put by the Court they have found that the scheme for compliance with s. 31 was

adopted three or four months before October 14, and that after the scheme had been so adopted Rees exercised no discretion or control except in reference to the financial provision. They also found in answer 6 that it was left to the manager, Shaw, to carry out the scheme, and that Rees did not know whether the work had been done or not. The question is whether those findings bring the respondents within the protection of s. 102. It cannot be disputed that on October 14 the mine was not managed in conformity with the Act by reason of the absence of efficient means for reversing the air current. That being so, the owners were prima facie liable to a penalty. They can only escape liability by showing that they satisfied the three requirements specified in s. 102, sub-s. 1. Now with regard to the first of those requirements I agree with what my Lord has said. Upon the admitted facts Rees was the person responsible for the delay in providing the proper apparatus; it was at his instigation that the extension of time was granted by the inspector, and it was left to him to determine what scheme should be adopted. I therefore come to the conclusion that he did take part in the management of the mine in respect of this matter. If he did so at any time it is in my opinion unnecessary to consider whether he did so at the time when the offence was committed. But I also think, and I am glad to know that Lush J. takes the same view, that the respondents have failed to prove that the offence was committed without their knowledge, consent, or connivance. On the facts it is clear that it was committed at least with the connivance of Rees, and that is sufficient even though it was not done with his consent. After the scheme had been decided upon he occasionally asked Shaw how the work was progressing, and I think the necessary inference is that he must have known on October 14 that the work was not completed. The justices have indeed found that he did not know whether the work had been done or not, but that is quite consistent with his shutting his eyes. In my opinion the respondents ought to have been convicted on the ground that they failed to bring themselves within either par. (*a*) or par. (*c*) of s. 102, sub-s. 1.

LUSH J. I agree with the result and think that the case must go back to the justices that they may convict. But I do not

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Lush J.

agree with the views that have been expressed by my Lord and Avory J. as to the effect of s. 102, sub-s. 1 (*a*). The scheme of the Act is undoubtedly to make not only the manager responsible if the mine is not managed in conformity with the Act, but prima facie to make the owner responsible also; in other words, it puts upon the owner a prima facie responsibility for the defaults of the manager. But s. 102 gives the owner a defence, in the event of proceedings being taken against him, provided he fulfils the three conditions therein mentioned. The first of those conditions, so far as it applies to this case, is that he "did not in respect of the matters in question take any part in the management of the mine." We may leave out of sight the words as to his not being in the habit of managing it, for there is no suggestion that Rees or any of the other directors were in the habit of doing so. What is the meaning of the words "did not take any part"? It seems to me that they must mean "did not at the time when the offence was committed take any part." The fact that the owner may have taken part in the management months before but had ceased to do so long before the offence was committed could not in my opinion put upon him responsibility for default of the manager. Then if that is the meaning of the words, did Rees prove that he was not taking any part at the time when the offence was committed? Rees in his capacity of owner was consulted with regard to this apparatus. He was entitled to be so consulted, for he had to find the money for it. I do not think that the mere fact that he was consulted and expressed his view as to the kind of apparatus that should be adopted of itself made him a person who was taking part in the management within the meaning of the section. There was clearly no evidence that he was taking part on October 14 or at any time after September 30, when the extended time for complying with the Act expired. Therefore, had the matter stood there, I should have thought that the justices were entitled to say that the offence was not proved. But in order to bring the respondents within the protection of s. 102 Rees had further to prove that the offence was committed without his knowledge, consent, or connivance. As to that question the justices now say that there was no evidence as to when Rees last made any inquiry, that he left the execution of the

work to the manager, and that he did not know whether the work had been done or not. I take that to mean that he failed to prove that on October 1 he did not know that the apparatus was incomplete. Therefore he failed to prove—and the onus was on him—that the offence was committed without his knowledge or consent.

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Judgment for the appellant.

Solicitor for appellant: *Treasury Solicitor.*

Solicitors for respondents: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

J. F. C.

PEERS *v.* CALDWELL.
TAYLOR *v.* CALDWELL.

1915
Dec. 14.

Betting—Game of Skill played for Money—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *s.* 1.

By s. 1 of the Betting Act, 1853, it is made an offence if any of the persons therein specified use premises "for the purpose of any money . . . . being received" by such persons "as or for the consideration for any . . . . promise . . . . to give thereafter any money or valuable thing on any event or contingency of or relating to any . . . . game."

A contingency is not the less within the section because it relates to a game which affords scope for skill and is not a game of pure chance.

Whether in the case of such a game the real consideration for the money deposited by the player is the opportunity of exercising his skill or the chance of winning the promised reward is in each case a question of fact. If the former, the game is not within the section; if the latter, it is.

The owner of an automatic machine kept it in a shop for the purpose of persons resorting to the shop playing with it in the following manner: The player placed a halfpenny in a slot which set mechanism in motion, whereby a ball was released from the top of the machine and found its way downwards through a number of projecting pins. Below the pins was a bar with a small receptacle attached, which could be manipulated by the player across the face of the machine, the object of the player being to catch the ball in the receptacle. If he succeeded the machine automatically ejected a check which could be exchanged in the shop for two-pennyworth of sweets. The game afforded some scope for the exercise of skill,

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but on the average the players, who were mainly boys, were successful in winning a check only once in every eight attempts :—

Held by Ridley and Avory JJ., Lush J. dissenting, (1.) that the fact of the game not amounting to what in ordinary parlance would be called a betting transaction did not prevent the use of the premises for the purposes of the game from being an offence within the above section ; (2.) that on the above facts there was evidence on which a magistrate could find that the real consideration for which the halfpenny was paid by the players was the chance of winning sweets and not merely the opportunity of exercising their skill.

CASE stated by the stipendiary magistrate for Liverpool.

An information was preferred against the appellant Ernest Albert Peers charging that he on May 25, 1915, and other days thereafter, being a person using a shop at No. 38, Oldhall Street in the city of Liverpool, permitted the same to be used for the purpose of money being received by him or on his behalf as the consideration for an undertaking to give thereafter a certain valuable thing, to wit, a check entitling the holder to obtain goods to the value of 2*d*., on a contingency relating to a game known as "The Clown," contrary to s. 1 of the Betting Act, 1853. (1)

A further information was preferred against the appellant Catherine Taylor charging that she on the days aforesaid, being the occupier of the said shop, wilfully permitted the same to be used for the purposes aforesaid.

The two informations were heard together, when the following facts were proved or admitted :—

(*a*) The appellant Peers is the owner of two automatic machines known as "The Clown" which were placed and kept by him at the shop No. 38, Oldhall Street occupied by the appellant Taylor.

(*b*) The appellant Taylor carries on at the said shop a small confectionery, refreshment, and sweet shop business.

(1) By s. 1 of the Betting Act, 1853, "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same . . . . betting with persons resorting thereto ; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport or exercise. . . . ."

(*c*) The automatic machines known as "The Clown" are worked as follows: The operator first places a halfpenny in a slot on the right-hand side of the machine, and then turning a handle releases a ball, which thereupon proceeds to gyrate from the top of the machine downwards through a number of projecting metal pins. Directly under the pins there is a bar to which is fixed the figure of a clown holding a cap in his hand. This bar and figure can be manipulated by the operator by means of a handle in the left-hand side of the machine across the whole face of the machine, and the aim of the operator is to catch the ball after it has passed through the pins in the cap of the clown. If the operator is successful in so catching the ball a check is ejected from the machine having the face value of either 1*d.* or 2*d.*, as the case may be, and the operator in addition to receiving such check also receives the right to another turn at the machine free of charge. The checks received as aforesaid are negotiable only in the said shop No. 38, Oldhall Street.

(*d*) The said shop is visited by a large number of persons, particularly by youths and young boys, for the purpose of playing with the said machines, and the police witnesses testified to the fact that while they were in the shop on May 31, 1915, between the hours of 12.50 P.M. and 1.2 P.M. seventeen boys of fourteen to fifteen years of age came into the shop and used the machines twenty-seven times between them.

(*e*) Upon the average those who so visit the shop and play with the machines are successful in catching the ball and so winning a check about once in every eight attempts.

(*f*) The checks are visible to the operator while he is playing with the machines, and he accordingly knows whether the check which he is seeking to obtain will be one worth 2*d.* or only 1*d.*

(*g*) The terms and conditions upon which the machines are placed and kept by the appellant Peers in the appellant Taylor's shop are as follows: The receptacle in each machine into which the halfpennies are received is kept locked, and the key is in the possession of Peers, who periodically attends at the shop for the purpose of unlocking it and taking the receipts. Taylor, under an agreement with Peers, is paid by him the full amount of the face value of all the checks which have been won from the machines

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and negotiated in her shop, and also a further sum equal to 25 per cent. of the net takings of the machines after deduction therefrom of the amount paid to her in respect of the checks.

On behalf of the appellants it was contended that it had already been decided by the Court of Appeal that "The Clown" machine is a game of skill, not of chance (*Pessers v. Catt* (1)), and that neither of the appellants could be convicted of betting or using the premises for betting with the persons who used the machines.

The magistrate was of opinion that he was bound by the decision cited that "The Clown" machine is a game of skill and not of chance, but he held that for the purpose of these proceedings it was immaterial whether the game was one of skill or chance. He was further of opinion that under the circumstances stated the appellant Taylor knowingly permitted her premises to be used, and that the appellant Peers wrongfully used them, in contravention of s. 3 of the Betting Act, 1853, and he accordingly convicted them both.

Gordon Hewart, K.C., and *Caradoc Rees*, for the appellants. The use of the shop for the purposes of this game is not an offence within the Betting Act, 1853. That Act was designed, as the title and preamble show, for the purpose of suppressing betting houses. The Act is intituled "An Act for the suppression of Betting Houses," and the preamble recites: "Whereas a kind of gaming has of late sprung up tending to the injury and demoralization of improvident persons by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse races and the like contingencies: For the suppression thereof be it enacted" &c. Unless, therefore, this game can be said to be a betting transaction it is not within the scope of the Act. But it cannot be regarded as a betting transaction because it is a game of skill. The Court of Appeal in *Pessers* v. *Catt* (1) held with regard to this very machine that it was a game of skill and as such was not an unlawful game under the Gaming Act, 1845. A similar conclusion was arrived at by the Court of Justiciary in Scotland in *Carlo* v. *M'Intyre* (2) with

(1) (1913) 77 J. P. 429. (2) (1913) 51 Sc. L. R. 49.

respect to an almost identical machine under a Glasgow Police Act. The magistrate, however, thought that it was immaterial for the purposes of this case whether it was a game of skill or not. He seems to have thought that because there was an arithmetical ratio between the money paid by the player and the prize to be won the arrangement between the parties might be expressed in the terms of a bet and therefore was within the Act. But if that view is right, then every candidate for a scholarship examination who pays an entrance fee, which bears a certain ratio to the value of the scholarship, is embarking on a betting transaction. It has never been suggested that a man who sets up cocoanuts at a race meeting to be thrown at with sticks at so much a throw is committing an offence against s. 1 of the Betting Act. There is a broad distinction between a bet and the payment of an entrance fee for the liberty to enjoy the exercise of one's skill. The definition of a bet is that given by Hawkins J. in *Carlill* v. *Carbolic Smoke Ball Co.* (1): "A wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties." That definition excludes the possibility of a stake deposited by the players at a game of skill to abide the result of the game being a wager. For each has an interest in the game, beyond the winning of the stake, in the satisfaction that he will derive from the competition. The case of the appellant Taylor is even stronger against the propriety of the conviction. For Hawkins J. went on to point out that "It is essential to a wagering contract that each party may under it either win or lose. . . . . If either of the parties may win but cannot lose . . . . it is not a wagering contract." The arrangement was that she should be paid the face value of the checks which she took in exchange for the sweets and a percentage of the profits; so that she got at least her profit on the sweets sold, and stood to lose nothing.

(1) [1892] 2 Q. B. 484, 490.

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Rigby Swift, K.C., and *J. H. Layton*, for the respondent. The view taken by the Court of Appeal of the nature of this game in *Pessers* v. *Catt* (1) is not binding on any other Court, for it has since been held in *Bracchi* v. *Rees* (2) that the question whether this game is one of skill or of chance is a question of fact, and the view of the Court of Appeal was treated as merely a finding of fact. The magistrate here ought, if the question had been material, to have found for himself whether the game was one of skill or not instead of treating it as a matter of law. But it was immaterial. Even if it was a game of pure skill it was within the Betting Act. The fallacy of the appellants' argument lies in the assumption that that Act deals with betting and with nothing else. In *Bond* v. *Plumb* (3) it was held that the two branches of s. 1 deal with two separate and distinct offences. The first deals with betting in terms; the second says nothing about betting, the language being much wider. In that case it was unnecessary for the Court to decide whether the second branch was confined to cases of betting in the ordinary sense of that term. Lord Coleridge C.J. said: "I will assume that s. 1 of the Act does not go beyond the preamble, though, if it did, I am clear that the words of the section ought to prevail." It is contended that whenever two persons resort to premises for the purpose of playing a game, even though a game of pure skill, and each deposits a stake which is to go to the winner, that is a transaction within the section. So under the Licensing Act, 1872, it has been held that playing a game of skill for money is gaming: *Dyson* v. *Mason*. (4) The essence of the offence in each case lies not in the nature of the game played, but in the fact that it is played for money. Moreover, in this case what took place might not incorrectly be described as a bet. The owner of the machine in substance said to the boys "I will bet you two pence to a halfpenny that you have not the requisite skill to catch the ball in the clown's cap." In *Fielding* v. *Turner* (5), where a shopkeeper who kept in his shop an automatic machine, which was used in a manner very similar to that in the present case, was held to have committed an offence under the Gaming House Act, 1854, Lord

(1) 77 J. P. 429.
(2) (1915) 79 J. P. 479.
(3) [1894] 1 Q. B. 169, 172.
(4) (1889) 22 Q. B. D. 351.
(5) [1903] 1 K. B. 867.

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Alverstone C.J. treated the use of the machine as equivalent to a bet. He said: "The keeper or owner of any such machine backs his chance against the person who uses it."

Gordon Hewart, K.C., in reply.

RIDLEY J. In this case the appellant Peers, as being a person using a shop at No. 38, Oldhall Street in the city of Liverpool, and the appellant Taylor, as being the occupier of the shop, were charged with knowingly permitting the same to be used for the purpose of money being received by them or on their behalf as the consideration for an undertaking to give thereafter a certain valuable thing on a contingency relating to a game, contrary to s. 1 of the Betting Act, 1853. Upon the facts as set out in the case the first question which arose was whether the particular game was a game of skill or one of chance. The magistrate thought that he was bound by the decision of the Court of Appeal in *Pessers* v. *Catt* (1) as matter of law to hold that it was a game of skill. In that view he seems to have been mistaken, for it has been decided in *Bracchi* v. *Rees* (2) that it is a question of fact, and that notwithstanding the decision of the Court of Appeal it is open to the magistrate to find either way. But here the magistrate went on to hold that it was immaterial whether this game was one of skill or chance, and that, even if it was the former, he was bound to convict. We will assume for the purposes of the argument to-day that it was a game of skill, and the question arises whether on that assumption what took place between the boys who played at this game on the one hand and the appellants on the other amounted to a transaction within the second part of s. 1 of the Act. Now I think we must not be misled by consideration of the strict meaning of the word "betting," for that word, although used in the first part of the section, is not used at all in the second part under which these proceedings were taken. As was pointed out by Lord Coleridge C.J. in *Bond* v. *Plumb* (3), the section deals with two separate and distinct offences; the first part of the section deals with betting eo nomine, the keeping of houses for the purpose of "betting with persons resorting thereto," while the second deals with the keeping

(1) 77 J. P. 429. (2) 79 J. P. 479.
(3) [1894] 1 Q. B. 169.

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of houses for the purpose of receiving money in advance, not necessarily in connection with betting in the ordinary sense of that term, but as and for the consideration of an undertaking to pay thereafter money or money's worth on a contingency of the kind therein specified. Now it seems to me that that is exactly what happened here when the boys put their halfpennies into the machine and took their chance of getting two-pennyworth of sweets. No doubt this is a small and trifling matter, but I think that it is one of those things that were meant to be hit at by the Act. It is contended that it is not within the scope of the Act. Why is it not? In the case of *Fielding* v. *Turner* (1), where the question was whether the use of a very similar automatic machine was an offence under the Gaming Act, Lord Alverstone C.J. said: "The keeper or owner of any such machine backs his chance against the person who uses it." That is I think the proper way of regarding the transaction which took place here. The appellants backed their chance that the boys would not catch the ball in the cap. It was in the nature of a wager. The fact of there being a possibility of exhibiting some degree of skill in playing with this machine does not, in my opinion, affect the question of the liability of the appellants. To my mind the boys were not exercising skill; they were thinking only of the sweets. In my opinion the conviction must be affirmed.

AVORY J. I am of the same opinion. For the purpose of my judgment I will assume that this machine was what is called a game of skill, which means, as I understand, a game which affords scope for skill as distinguished from a game of mere chance. It must be borne in mind that to call a game a game of skill does not involve that everybody who plays at it plays with skill. A man may think he is playing billiards, which is a game of skill, and he may always miss what he aims at and frequently cut the cloth; a man may think he is playing cricket, and he may be bowled by every straight ball or caught off every one that is off the wicket; in neither case does he show any skill, though he is playing at a game in which there is scope for skill. I think it is important to bear that in mind when we come to consider what the magistrate had

(1) [1903] 1 K. B. 867, 871.

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to decide. It was proved before him that in the course of twelve minutes on one day seventeen boys used these machines twenty-seven times between them, so that there was very little time for the exercise of skill, and the evidence was that the players were on an average successful only once in every eight times. The magistrate had to decide whether under those circumstances the user of the machines brought the appellants within the second part of s. 1 of the Betting Act, 1853. That section has been truly described as applying to two different kinds of transactions; the first branch of the section applies to a person who keeps an office for the purpose of betting, either on credit or for ready money, with persons resorting to the office; the second branch deals with persons keeping an office for the purpose of what has been described as "ready-money betting," that is to say, for the receipt of money in advance, as the customer's stake, for which purpose a resorting to the office is not necessary. Although that elliptical expression "ready-money betting" has been applied to the second branch of the section, I think it is important not lose to sight of the fact that the Legislature, when they came to the second branch, omitted the words "bet" or "betting" entirely and substituted much wider words, in order, apparently, to cover cases as to which there might be a question whether they amounted to betting in the ordinary sense of that term. What we have to determine is whether there was any evidence on which the magistrate could find that the appellants were using these premises for the purpose of money being received as the consideration for a promise to give thereafter a valuable thing on an event relating to a game. I agree with Mr. Gordon Hewart that the test is what was the consideration for the halfpenny. If it was clear that these boys paid their halfpennies as entrance fees for the purpose of entitling them to take part in a game of skill, the transaction would not constitute an offence under the second branch of the section. On the other hand, if the consideration for the halfpenny was solely the promise of the appellants to give the player two-pennyworth of sweets if the ball fell into the clown's cap, it is equally clear that the transaction did constitute such an offence. To my mind it was plainly open to the magistrate, notwithstanding that he came to the conclusion that he was bound by the decision of the Court of Appeal to treat

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the game as one of skill, to hold that the latter was the real consideration. For myself I do not for one moment believe that the boys were paying their halfpennies for the privilege of competing at a game of skill; they were simply gambling on the chance of getting two-pennyworth of sweets, and that, in my opinion, is what the magistrate intended to find. Under those circumstances he was right in convicting, and this appeal must be dismissed.

LUSH J. I regret to say that I have come to a different conclusion. These proceedings were not taken under the Gaming Act, but under the Betting Act, 1853. If they had been taken under the Gaming Act I think there would have been materials on which the magistrate could have convicted, because he was not bound to hold as matter of law that this was a game of skill; and if he had come to the conclusion that it was a game of chance a conviction under the Gaming Act would have been a proper conviction. But was it right to convict under the Betting Act, 1853? That that is a Betting Act pure and simple is in my opinion clear from the title, the preamble, and the language of the sections. It is intituled "An Act for the suppression of Betting Houses." The preamble recites that "a kind of gaming has sprung up tending to the injury and demoralization of improvident persons by the opening of places called betting houses . . . . and for the suppression thereof be it enacted"; and in *Bond* v. *Plumb* (1) Lord Coleridge C.J. assumed that s. 1 did not go beyond the preamble. He held, indeed, that the two branches of the section dealt with separate offences, ready-money betting and betting on credit, but he was evidently of opinion that the second branch equally with the first dealt only with betting transactions. He accepted the view that the Act was an Act for the suppression of betting and nothing else. Here the magistrate has not found that the use of these machines amounted to a betting transaction, nor was there, I think, any evidence on which he could have so found. He held that there was "gaming," and that the game was a game of skill. In my view, unless the magistrate could say that these premises were used for the purpose of money being received for betting purposes there could be no

(1) [1894] 1 Q. B. 169.

conviction under this Act. It certainly strikes me as strange that, if the proceedings had been taken under the Gaming Act, there could have been no conviction on the footing that the game was one of skill, but that under the Betting Act there could be a conviction. In my opinion if the game had been one of chance the proper Act to proceed under would have been the Gaming Act, but as it was one of skill no conviction could be obtained under either. It is, I think, impossible to describe the transaction as one in which the premises were used for the purpose of money being received as the consideration for a promise to pay money's worth on a contingency relating to a game. The boys on these findings paid their halfpennies not for the chance of getting some sweets, but for the purpose of getting them as a reward for the exhibition of a certain degree of skill. Though I agree that the inviting of boys to play with such a machine as this may well be thought mischievous, I do not think that we should be justified in straining the terms of the Betting Act, 1853, to make it apply to such a case as that which is before us. For these reasons I think that the conviction was wrong.

Appeal dismissed.

Solicitors for appellants: *Crowder, Oldhams & Co., for G. J. Lynskey & Sons, Liverpool.*

Solicitors for respondent: *F. Venn & Co., for E. R. Pickmere, Liverpool.*

J. F. C.

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C. A.
Nov. 5.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

In re WILSON.

Bankruptcy—Deed of Arrangement—Validity—Execution by Person authorized by Power of Attorney—Affidavit verifying Execution—Assent of Majority of Creditors in Number—Creditors for Sums not exceeding 10*l.*—*Registration of Power of Attorney as Deed of Arrangement—Application by Debtor for Declaration that Deed of Arrangement void—Jurisdiction of Court—Conduct of Debtor preventing him from relying on Invalidity of Deed—Deeds of Arrangement Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 47), *ss.* 1, 3, 5, 23.

By s. 23 of the Deeds of Arrangement Act, 1914, "Any application . . . . by the debtor . . . . for the enforcement of the trusts or the determination of questions under" a deed of arrangement for the benefit of the debtor's creditors generally "shall be made to the Court having jurisdiction in bankruptcy in the district in which the debtor resided or carried on business at the date of the execution of the deed":—

Held by the Court of Appeal (reversing the decision of the Divisional Court), that an application by the debtor for a declaration that a deed of arrangement was void, upon the ground that it did not comply with the provisions of the Act, was not an application for the enforcement of the trusts or the determination of questions "under" it, and therefore a county court judge having jurisdiction in bankruptcy had no jurisdiction to entertain the application.

A debtor gave his sister a power of attorney authorizing her to execute a deed of arrangement for the benefit of his creditors and to make any affidavit necessary for registering the deed. The deed was accordingly executed by her as his attorney under the power, and she also made the affidavit required by s. 5, sub-s. 1, to be made "by the debtor" on the registration of the deed stating the total estimated amount of property and liabilities included under the deed and the names and addresses of the creditors. There were ninety-six creditors in all, of whom sixty-eight were for sums over 10*l.*; twenty-five of the sixty-eight did not assent to the deed within the time required by the Act; forty-three with debts over 10*l.* and twenty-eight with debts under 10*l.* assented. The debtor escaped bankruptcy proceedings by reason of the execution of the deed and afterwards recognized it and concurred in the trustee acting under it. He subsequently made an application for a declaration that the deed was void. No creditor was made a party to the application, it being addressed to the trustee of the deed alone:—

Held by the Divisional Court—(1.) that execution of the deed by the debtor personally was not necessary and that it could be

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executed by the donee of the power of attorney given by the debtor for that purpose; (2.) that the affidavit required by s. 5, sub-s. 1, could not be made by the donee of the power, but must be sworn by the debtor personally, and that the deed was therefore void under s. 2 of the Act for non-registration; (3.) that the deed had received the assent of the majority of creditors in number within the meaning of sub-s. 5 of s. 3 of the Act, inasmuch as for the purpose of the section creditors whose debts amount to sums not exceeding 10*l.* are not to be reckoned either in calculating the total number of creditors or the majority in number; (4.) that inasmuch as the creditors did not, under the power of attorney, gain any control over the debtor's property or business, it was not in itself a deed of arrangement within the meaning of s. 1, sub-s. 2 (*e*), of the Act, which required registration in order to be valid; (5.) (*per* Horridge J.) that the debtor had by his conduct prevented himself from relying upon the invalidity of the deed; (*per* Rowlatt J.) that the Court would not in the absence of the creditors make an order declaring that the deed was void.

APPEAL from the judge of the county court of Shropshire holden at Shrewsbury.

On March 17, 1915, the debtor, Richard Stanley Wilson, who was a farmer and maltster near Shrewsbury, but was at that time serving in France as a major in the Army, gave his sister, Florence Alice Hewitt, a power of attorney authorizing her to execute a deed of arrangement for the benefit of his creditors generally. The power of attorney, which was under seal, was prepared in England and sent out to the debtor in France and executed by him there. By the power the debtor appointed his sister to be his attorney for (inter alia) the following purposes: "For me and on my behalf and in my name to execute a deed of conveyance and assignment of all my real and personal estate of whatsoever nature or kind and wheresoever situate to Robert Hope Johnston of Queen Street Wolverhampton in the county of Stafford chartered accountant as trustee for the benefit of my creditors . . . . And to include in such deed all such provisions and powers to the said Robert Hope Johnston or any other person or persons as she the said Florence Alice Hewitt in her absolute discretion shall think fit Also to make any affidavit or affidavits and do all other acts and things for me or on my behalf which may be necessary for registering and carrying into effect and making legally binding the said deed of assignment and generally to do all such acts deeds and things which she in her

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absolute discretion shall think fit in the conveyance or assignment management or carrying on or winding up of my said estate and as fully and effectually as I could do if I were present and acting in my proper person and all and whatsoever my said attorney shall do or cause to be done in or about the premises I hereby covenant with the said Florence Alice Hewitt to allow ratify and confirm."

The deed of arrangement was accordingly executed by Florence Alice Hewitt on March 20, 1915, as the debtor's attorney under the power. The affidavit required by s. 5, sub-s. 1, to be made " by the debtor stating the total estimated amount of property and liabilities included under the deed . . . . and the names and addresses of his creditors " was also made by her as the donee of the power, and the deed was registered. There were ninety-six creditors in all, of whom sixty-eight were creditors for sums over 10*l.*; twenty-five of these sixty-eight did not assent to the deed within the time required by the Act. Forty-three creditors with debts over 10*l.* did assent, and in addition twenty-eight creditors with debts under 10*l.* also assented.

On May 7, 1915, the debtor returned to England and called with a solicitor at the office of Robert Hope Johnston, the trustee of the deed. A long interview took place, at which the trustee explained to the debtor what he (the trustee) had already done and what part of the estate had been realized. The debtor took notes of the particulars with which he was furnished and also gave information about certain properties comprised in the deed of arrangement. He took no exception whatever to the deed, and he asked, if possible, that no sale of his furniture should take place until he was able to return to this country. The furniture was not sold. The trustee explained to the debtor that he was about to offer all the public-houses comprised in the estate for sale by auction and that he had already instructed an auctioneer to act in the matter. The debtor did not object and inquired what funds were in hand, and suggested that the trustee should pay a substantial dividend to the creditors. On May 12, 1915, the trustee wrote to the debtor giving him particulars of what was going on as regarded the estate, and on May 29 he wrote and informed him that the licensed properties would be offered at the Star and Garter on Wednesday, June 22. In a letter from the debtor to Mr. Pratt,

a member of the firm of solicitors then acting for the debtor, dated June 19 he said that the trustee promised to write to him each Saturday giving him a statement of what moneys had been paid in, that this promise was made on May 6, and that so far he had received no statements. In the same letter he said, "He has told me that the farm valuations brought in something over 5000*l*. This I consider good and far above the estimate shown in my returns." This statement probably referred to information contained in a letter of June 5, 1915, from the trustee to the appellant saying "The valuation of the farms to Wainwright has been completed and he had to pay a total sum of 5048*l*." It was clear from the evidence that the debtor escaped bankruptcy proceedings by reason of the deed.

In October, 1915, the debtor applied to the county court judge for a declaration that the deed of arrangement was void, upon the ground that it did not comply with the provisions of the Deeds of Arrangement Act, 1914 (1)—first, because under the provisions of ss. 1 to 5 of the Act the deed must be executed by the debtor personally and the affidavit in support must be sworn by the debtor personally; secondly, because the power of attorney was in itself a deed of arrangement under s. 1, sub-s. 2 (*e*), and, not being registered, was void; and, thirdly, because the assent of the statutory majority of the creditors to the deed required by s. 3 of the Act had not been obtained.

The notice of motion was addressed to the trustee alone, no creditor being made a party to it. The county court judge decided against the contentions of the debtor and dismissed the application. The debtor appealed.

Oct. 25, 26. *E. W. Hansell* and *Graham Milward*, for the respondent. There is a preliminary objection to the hearing of this appeal. Neither the county court nor this Court has jurisdiction to entertain an application for a declaration that a deed of arrangement is void. The power of the Bankruptcy Court to deal with deeds of arrangement arises solely under the Deeds of Arrangement Act, 1914. Sect. 23 of that Act provides that any application for "the determination of questions under" a deed of arrangement

(1) See note on p. 401, post.

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shall be made to the Court having jurisdiction in bankruptcy in the district in which the debtor resided or carried on business at the date of the execution of the deed. The application in this case is for a declaration that the deed of arrangement is void; in other words, the applicant asserts, and asks the Court to declare, that there is no deed. That is not an application to determine a question "under" the deed. An applicant who seeks to impeach the validity of a deed cannot be heard to say that the question arises "under" the deed. In s. 11 of the Act express power is given to the Court to declare a deed void if the requirements of that section have not been complied with by the trustee. The absence of any similar provision in s. 23 supports the view that the Court has no power, apart from cases within s. 11, to declare a deed of arrangement void.

McCall, K.C., and *Tindale Davis*, for the appellant. The question whether a deed is valid is a question arising "under" the deed. [Rule 16 of the Deeds of Arrangement Rules, 1915, was referred to.]

[HORRIDGE J. We think that the preliminary objection fails, but we will hear the appeal before giving our reasons.]

There are five grounds on which this deed is invalid:—(1.) The deed was not executed by the debtor personally as required by the Deeds of Arrangement Act, 1914. (2.) The affidavit as to his property, liabilities, and creditors was not sworn by him personally as required by the Act. (3.) There was no statutory majority of creditors in number as required by s. 3 of the Act. (4.) The power of attorney given by the debtor is itself a deed of arrangement under the Act, and in order to be valid must be registered. (5.) The deed is wholly void, and no acquiescence or estoppel can give it validity.

Sect. 2 of the Deeds of Arrangement Act, 1914, enacts that the deed must be registered after execution "by the debtor"; those words mean that the deed is to be executed by the debtor personally. The language of s. 5, sub-s. 1, shows that the affidavit must be made "by the debtor" and cannot be made by an attorney. *In re Bagley* (1) shows the importance of the affidavit. The character impressed by statute upon a deed cannot be changed by the doctrine of estoppel: *Ashbury Railway Carriage*

(1) [1911] 1 K. B. 317.

and Iron Co. v. *Riche.* (1) If a statute says a deed is to be void no estoppel can give validity to it: *In re Monolithic Building Co.* (2) There was no statutory majority in number of creditors under s. 3, sub-s. 5. There were ninety-six creditors, and as the number of creditors for sums over 10*l.* who assented was only forty-three, a majority in number was not obtained.

E. W. Hansell and *Graham Milward*, for the respondent. The deed was validly executed in law by the debtor, though it may be void under the Deeds of Arrangement Act, 1914. That statute only provides (s. 1) that when a person executes a deed of assignment it must comply with the provisions of the Act, otherwise it is void. It is not necessary to have the personal signature of the debtor to make it a deed.

In the circumstances of the present case the appellant cannot now be heard to say the deed is void, because (1.) he has taken an advantage under the deed; (2.) the trustee and the creditors have on the faith of the deed acted to their detriment. Therefore the appellant, who has allowed that state of things to exist, cannot now be heard to attack the deed. By means of the deed he avoided bankruptcy proceedings and obtained a release from his debts. He is therefore precluded from saying that the deed is void for any purpose: *Roe* v. *Mutual Loan Fund* (3); *O. Comitti* v. *Maher.* (4) The deed contains an agreement with the trustee as to his remuneration and with the creditors who released their rights. In its terms the power of attorney is sufficient to authorize the donee to execute the deed and to make the affidavit if the law allows those things to be done. Unless there is something in the Deeds of Arrangement Act, 1914, to prevent it, the appellant could give another person a power of attorney to execute the deed: *Furnivall* v. *Hudson.* (5) The mere fact that in the Act of 1914 the word "debtor" is used does not prevent him from executing the deed by an attorney under a power. The affidavit can also be made by attorney. *Herschfeld* v. *Clarke* (6) and *Christopherson* v. *Lotinga* (7) are distinguishable. In those cases the Courts felt bound by the positive and precise

(1) (1875) L. R. 7 H. L. 653.
(2) [1915] 1 Ch. 643.
(3) (1887) 19 Q. B. D. 347.
(4) (1905) 94 L. T. 158.
(5) [1893] 1 Ch. 335.
(6) (1856) 11 Ex. 712.
(7) (1864) 15 C. B. (N.S.) 809.

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language of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), to hold that an affidavit must be made by a party to the cause.

Sect. 5 of the Act of 1914 does not mean that the affidavit must be made by the debtor personally. Although the form given in the Act of 1914 gives the signature of the debtor, r. 4 of the Deeds of Arrangement Rules, 1915, shows that the forms are elastic, as it refers to "forms of a like character" and gives the Board of Trade power to alter them in certain cases. See also *In re Batten* (1); *Maskelyne and Cooke* v. *Smith.* (2) The object of the affidavit is to enable the creditors to ascertain what the position of the estate is, and it is quite immaterial to that object whether the affidavit is signed by the debtor personally or not.

There was the majority in number of creditors required by s. 3 of the Act of 1914. The words "creditors whose debts amount to sums not exceeding 10*l.* shall be reckoned in the majority in value but not in the majority in number" mean that, in reckoning the majority in number, creditors for debts not exceeding 10*l.* are not to be reckoned at all. Therefore in the present case the sixty-eight creditors for sums over 10*l.* are the total number to be counted, and of these the forty-three who assented form a majority in number.

The power of attorney is not a deed of arrangement within the Act of 1914. It was not given for the purpose of winding up the debtor's business or disposing of it with a view to the payment of his debts within the meaning of s. 1, sub-s. 2 (*e*). It conferred no control over the business upon the donee. Its object was to enable the donee to execute the deed of arrangement. Even if it were a deed of arrangement it would still be perfectly valid as a power of attorney upon the principle of the decision in *Mumford* v. *Collier.* (3) [*Greaves* v. *Tofield* (4) was also referred to.]

McCall, K.C., in reply. In *In re Batten* (5) Lord Esher M.R. said that under the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), the affidavit was "to be made by the debtor." As to the majority of creditors in number, the Act of 1914 has created an

(1) (1889) 22 Q. B. D. 685.
(2) [1903] 1 K. B. 671.
(3) (1890) 25 Q. B. D. 279.
(4) (1880) 14 Ch. D. 563.
(5) 22 Q. B. D. 685, 694.

artificial majority, and hard cases on either side of the line may easily be put. The creditors to be taken as the total number are those mentioned in the list of the creditors in the affidavit. The majority mentioned in s. 3 is the majority of "the creditors," i.e., all the creditors. The power of attorney ends with the words "generally to do all such acts . . . . which she in her absolute discretion shall think fit in . . . . carrying on or winding up of my said estate"—i.e., the donee is authorized to manage, carry on, or wind up the business. Winding up the estate means getting in the credits and paying the debts. The contention that the applicant is estopped from saying that the deed is void was relied upon and was unsuccessful in *In re Bagley*. (1) There can be no estoppel upon the question whether the deed is valid, although the trustee, if subsequently sued for damages by the appellant, might be able to plead that he did the act complained of with his consent: *Hedges* v. *Preston*. (2) The appellant is entitled to the declaration he claims if the deed is in fact void: *In re Saumarez* (3); *Bellerby* v. *Rowland and Marwood's Steamship Co.* (4) As the Act of 1914 enacts that the deed is to be void, no acquiescence or estoppel can make it valid. [*Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (5), *In re Rileys* (6), and sub-s. 1 of s. 11 of the Deeds of Arrangement Act, 1914, were also referred to.]

Cur. adv. vult.

Nov. 1. The following judgment was read by

HORRIDGE J. This was an appeal from a judgment of his Honour Judge Tobin, judge of the Shropshire County Court holden at Shrewsbury, whereby he dismissed with costs a motion made on behalf of Richard Stanley Wilson. That motion asked for (1.) a declaration that the deed of arrangement dated March 20, 1915, is void and of no effect on the ground that the provisions of the Deeds of Arrangement Act, 1914, have not been complied with; (2.) an injunction until the hearing of the application to restrain the trustee, his servants and agents, from dealing with or in any way disposing of the assets included in the said deed or in any way acting thereunder.

(1) [1911] 1 K. B. 319.
(2) (1899) 80 L. T. 847.
(3) [1907] 2 K. B. 170.
(4) (1902) 86 L. T. 671.
(5) [1915] 2 K. B. 379.
(6) [1903] 2 Ch. 590.

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Before the learned judge his jurisdiction to entertain the motion was expressly admitted. Before this Court the point was taken that the question of whether or not the deed was null and void did not relate to the enforcement of the trusts or the determination of questions under it, and therefore this Court had no jurisdiction to entertain the appeal. In my view, if there is a deed of arrangement answering the description in ss. 1 and 23 of the Act, the Court has jurisdiction to determine the following questions which arise in this case, as I think they were questions under the deed, namely, as to whether (1.) the formalities on registration of the deed were duly complied with, (2.) as to whether the majority of the creditors required by statute have assented to the deed, and (3.) as to whether the circumstances of the case have precluded the appellant from objecting to the validity of the deed. I think, in the first place, the Court has to be satisfied that there is such a deed. In this case there are two objections taken to the deed. The first is that a deed for registration under the Act of 1914 could not be executed by an attorney acting under a power of attorney. I can see no reason why a debtor should not authorize a third party under a power of attorney to execute for him, as such execution would be, under the power of attorney, the execution of the debtor. I think this point is concluded by the decision in *Furnivall* v. *Hudson*. (1) As a further objection to the deed it was said the power of attorney itself was, within the meaning of s. 1, sub-s. 2 (*e*), of the Deeds of Arrangement Act, 1914, a deed of arrangement which was void under s. 2 for non-registration. Sub-s. 2 (*e*) of s. 1 only applies to deeds which comply with the provisions in that section, namely, cases where creditors of the debtor obtain any control over his property or business, and I do not think the creditors by the power of attorney obtained in this case any control over his property or business. I hold that there was a good deed of arrangement which could have been duly registered and to which the creditors could have assented. I therefore think this Court has jurisdiction to deal with the three further questions which arise on this appeal, and in my view they arise under the deed.

The first question is whether s. 5 of the Deeds of Arrangement Act, 1914, has been complied with. That section requires, besides

(1) [1893] 1 Ch. 335.

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an affidavit verifying the time of execution and containing a description of the residence and occupation of the debtor and of the place or places where his business is carried on, an affidavit by the debtor stating the total estimated amount of property and liabilities included under the deed, the total amount of the composition (if any) payable thereunder, and the names and addresses of his creditors. In this case an affidavit purporting to comply with the above requirements was made by his attorney, and no affidavit was sworn by the debtor. I can see no reason to extend the words of the section, which are perfectly plain, so as to allow the affidavit to be made by any other person than the debtor. A somewhat similar question arose under Order XIV. of the Rules of the Supreme Court, 1875, as to whether or not the affidavit under Order XIV., r. 1, could be made by any person other than the plaintiff, the rule being worded as follows: "the plaintiff may, on affidavit verifying the cause of action"; and it was held in the two cases of *Frederici* v. *Vanderzee* (1) and *Bank of Montreal* v. *Cameron* (2) that "plaintiff" meant plaintiff, and that nobody else could make the affidavit. I think, therefore, if it was not for the question as to the appellant's own conduct, I ought to decide this deed of arrangement to have become void for non-registration.

The next point taken with regard to the deed of arrangement is a small point, but one of importance, as it may affect the validity of many deeds of arrangement, and I think I ought to express my view upon it. It is said that the deed had not within s. 3 of the Deeds of Arrangement Act, 1914, received the assent of a majority in number and value of the creditors. The facts as to this which were admitted before us were that there were ninety-six creditors in all, of whom sixty-eight were for over 10*l.*; twenty-five of these sixty-eight did not assent within the time required by the Act; forty-three creditors with debts over 10*l.* did assent, and in addition twenty-eight creditors under 10*l.* also assented. For the appellant it was contended that on the true construction of s. 3, sub-s. 5, the total number of creditors must first be taken as defined under sub-s. 2, and in this case that number would therefore be ninety-six, but that under sub-s. 5 of the same section creditors for sums not exceeding 10*l.* are not reckoned in the majority in

(1) (1877) 2 C. P. D. 70. (2) (1877) 2 Q. B. D. 536.

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number, and majority in number means the number assenting—in this case seventy-one. If the twenty-eight under 10*l.* who assented are not to be counted as assenting, this reduces the number to forty-three, which is not a majority of ninety-six. On the other hand it is said that the words " creditors whose debts amount to sums not exceeding ten pounds shall be reckoned in the majority in value but not in the majority in number " mean that in ascertaining the majority the creditors for sums not exceeding 10*l.* are not to be taken into account, and that therefore the total creditors to be counted would be reduced to sixty-eight and that forty-three would be a majority. The construction contended for by the appellant would lead to some absurd positions. For instance, if there were twenty creditors nineteen of whose debts were below 10*l.*, a majority could never be obtained and no deed in these circumstances could be registered. I think the true view of what is meant by that section is that the creditors for amounts under 10*l.* are not to enter into the calculation by which a majority is to be arrived at, and that therefore in this case the forty-three were a majority of the sixty-eight creditors who were over 10*l.* I think on the best construction I can give to sub-s. 5 its provisions have been complied with.

The last and most difficult point remains behind, as to whether or not the conduct of the appellant can be relied upon to prevent his setting up the fact of the deed having become void. The learned county court judge, having held the deed was valid, said that if he was wrong in law he held that Major Wilson was estopped from claiming a declaration that the deed had become void because he impliedly represented to Mr. Hope Johnston that he would take no steps to have the deed declared invalid and that he would not derogate from his own grant. The argument for the appellant was that as the deed is rendered void by the Act of Parliament no conduct of his can prevent his coming to the Court and relying on its invalidity. It appears to me, apart from the legal question involved in this consideration, that the appellant so acted that if his conduct could be relied upon it would prevent his succeeding in this case. In *In re Bagley* (1) one Chapman, who had issued a bankruptcy notice and presented a petition in bankruptcy, was

(1) [1911] 1 K. B. 317.

held not to be prevented from taking those proceedings by the fact that he had previously assented to an assignment for the benefit of creditors which was held void because the affidavit of registration had been sworn before a solicitor who acted as solicitor for the trustee of the deed, and Cozens-Hardy M.R. said (1): "The first objection taken by the debtor was that Chapman had assented to the deed of arrangement and therefore was not in a position to present a bankruptcy petition, nor was his assignee. The answer to that is that the deed of arrangement is a nullity . . . ." In that case the only thing which had been done was that an assent had been given to the deed which it was not even shown the person giving the assent knew to be a nullity. I think this case would be a decision in favour of the appellant if he had merely executed the deed and done nothing else. [Having stated the facts above set out with regard to the debtor's conduct after May 7, 1915, the date upon which he returned to England, the learned judge continued:]

The appellant was therefore consenting to the winding up of his estate by the trustee and leading the trustee to believe that what he was doing was entirely regular and met with his approval. The trustee might say that if the appellant had not encouraged him in acting under the deed and taken the benefit of what he was doing he would not have proceeded further in the matter, and further he would no doubt rely when consenting to act and continuing to act as such trustee on the remuneration he would obtain. At the time when the deed was executed it is clear from the evidence the appellant escaped bankruptcy proceedings by reason of the deed. The question now arises whether he can, having taken the benefits of the deed and caused the trustee to incur responsibilities under it, turn round and say that the deed is invalid. I cannot find any case exactly upon the point, but I think what has been done in this case comes within the principle of *Roe* v. *Mutual Loan Fund.* (2) That is a bill of sale case, but it appears from the judgment of Pollock B. (3) that the objection to the bill of sale was that it infringed the statutory form and therefore it was a matter which rendered the bill of sale void, and if the parties were presumed

(1) [1911] 1 K. B. 323. (2) 19 Q. B. D. 347.
(3) (1887) 56 L. T. 631, 632.

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to know the law the defect must have been known to them. In the Court of Appeal it was held that the plaintiff having in the bankruptcy proceedings treated the bill of sale as valid and obtained an advantage to himself, could not afterwards allege that the bill of sale was invalid so as to entitle him to recover in an action for trespass, and Lord Esher M.R. (1) quoted with approval the judgment of Honyman J. in *Smith* v. *Baker* (2): "A man cannot . . . . say at one time that the transaction is valid, and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and at another time say it is void, for the purpose of securing some further advantage." Lord Esher M.R. continued: "The plaintiff first said the bill of sale was valid, and so he got, on paying 2*s.* 6*d.* in the pound, a release from all the debts of all his creditors. That is the advantage he got by treating the bill of sale as valid, and now he desires to treat it as invalid, to get a further advantage"; and later on: "I base my judgment on this, that the bankruptcy proceeded on the basis that the bill of sale was valid, and that this was with the knowledge and acquiescence and for the benefit of the plaintiff, who thereby affirmed that the bill of sale was valid, and cannot now be heard to say that it was invalid in order to obtain a further advantage." It appears, if this language is applied to the present case, that, although the mere fact of the execution of the deed would not affect the appellant's right to say that the deed has become void, his recognition of the deed and concurrence in the trustee acting under it and taking the benefits of it prevent the appellant now from saying the deed is invalid. In the case just referred to the bill of sale was made void by the statute, and this did not prevent the Court of Appeal from saying, to use the language of Lindley L.J. (3), "The plaintiff's position and that of the creditors, including the defendants, has been so changed that the plaintiff is estopped from saying that the representations on which the whole thing turned were incorrect." The view that I have taken does not make the registration of the deed good, but it prevents the appellant from relying on its invalidity. *Roe* v. *Mutual Loan Fund* (4) was

(1) 19 Q. B. D. 350.
(2) (1873) L. R. 8 C. P. 350, 357.
(3) 19 Q. B. D. 351.
(4) 19 Q. B. D. 347.

subsequently followed as regards the bill of sale point in *O. Comitti* v. *Maher*. (1)

I think the appeal must be dismissed with costs.

ROWLATT J. I agree in the result.

The first point taken was that this Court and the Bankruptcy Court below had no jurisdiction. That point was not taken in the Court below; on the contrary, it was agreed that there was jurisdiction. That, however, does not relieve us from considering the question, it being of course the duty of every Court to take notice of the limits of its jurisdiction and not to overstep them. I point that out because I have from time to time heard the contrary stated even in quarters where it would be least expected. That being so, the question of jurisdiction arises as follows: The Court of Bankruptcy has jurisdiction to enforce the trusts of and to decide any questions under the deed, and it is said that an application to declare a deed void is not a determination of a question "under" the deed. I confess that I have found very considerable difficulty on this point. Of course, when the Court is applied to to enforce trusts or to decide any question under the deed—an application clearly within the terms of the section—it must as a preliminary adjudicate upon the question whether there is a deed. The deed must be put in and, if challenged, proved, and the formalities connected with it also proved. The Court must decide that as a preliminary question, and if it is not decided in the affirmative, of course the application drops. That, however, does not appear to me to conclude the question whether the Court has jurisdiction to entertain an application to declare the deed void merely because in the course of the two proceedings the same issues have to be dealt with. The question of jurisdiction depends upon what the Court is asked to do as a result of the proceedings, not upon the issues which it will have to decide in the course of the proceedings. At the same time I recognize that it would be extremely inconvenient to sever the two jurisdictions, to have the Court of Bankruptcy being applied to to enforce the trusts of the deed and concurrently an action going on in the Court of Chancery to declare the deed void; it would not be a convenient course, nor, of course, in consonance with

(1) 94 L. T. 158.

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the present policy of our jurisprudence, and it is not one that one would anticipate the Legislature would desire to authorize.

The first point made is that this deed was not executed, that is to say, it was sealed by an attorney, but that that will not do, and that this deed was therefore never validly executed. I find the greatest possible difficulty in seeing how one can pass judgment upon a point of that sort "under" the deed. The question is whether there is a deed. How can you decide that under the deed? It appears to me that whether you decide that there is a deed or that there is not a deed you do not decide a question "under" the deed: jurisdiction does not depend on the result. The question of jurisdiction must be decided—as was said long ago by Lord Denman C.J. (1)—at the commencement of the proceedings, not at the end; and I find the greatest possible difficulty in saying that the first point taken on behalf of the appellant raises a question under the deed. That point may be put in another way. It may be said, Granted that the deed was properly executed in the first instance and therefore started life as a deed, it has now become void by reason of matters subsequent, and that raises a question arising under the deed, namely, the question of non-registration. I think that is a much more plausible way of putting it. I do not feel sure of it at all, because it seems to me that matters subsequent do not raise so much a question under the deed as the question of a formality quite collateral to the deed the absence of which is alleged to have avoided it. But on the whole I feel inclined to decide the matter in favour of the jurisdiction on a somewhat broader ground. I think one must say that the words "questions under" the deed really mean questions given birth to by the coming into existence of the alleged deed, that is, questions about or concerning the deed, and on that footing (I admit it is perhaps straining the language, looked at critically) I am prepared to decide in favour of the existence of the jurisdiction, thinking that was probably what was intended.

Having jurisdiction we have to give our decision on the merits. I entirely agree with what my brother has said on the first point. I think it is quite clear upon the construction of the statute that an affidavit by the debtor, occurring as it does in a section which requires another affidavit which is not specified as being by the

(1) See *Reg.* v. *Bolton* (1841) 1 Q. B. 66, 74.

debtor, clearly means an affidavit made by the debtor, and when there must be an affidavit made by the debtor it is impossible to have it made by his attorney. A man may give a power of attorney to file an affidavit on his behalf, but he cannot give a power of attorney to make an affidavit, and the contention is really one that belongs to comic opera and nothing else.

With regard to the point as to the majority of creditors, I again agree with my learned brother. The words "reckoned in the majority" do not in my judgment mean that the creditors referred to are to be reckoned amongst those voting in the negative. They mean they are not to be reckoned in calculating the majority; that means they are to go out of the adding up of either category of voters.

Lastly one comes to the point of estoppel, and I am bound to say that there again I find myself in considerable difficulties. There is abundant evidence that the appellant ratified this deed, and certainly the application does not come before us in prepossessing shape. But ratification is of no avail when the defect sought to be cured is a defect dependent upon the imperative requirements of an Act of Parliament, especially in a case like that of a deed of arrangement where all kinds of persons have their rights affected. The question is whether the debtor is estopped. The application here is confined to a declaration that the deed is void. No consequential relief is sought. It is really an application with regard to the status of the deed. Now the deed is void in fact and in law, and estoppel could not alter that, but an estoppel may prevent a person in any particular proceeding from alleging that fact. It estops him if he is seeking relief which it is unconscientious that he should receive upon the footing of denying the validity of the deed. I can well understand that the appellant would be estopped in a proceeding seeking to affect any past transactions by the trustee which he had carried out upon the faith of representations that the deed was going to be treated as valid. But that is not this application, and I feel great difficulty in saying that he can be estopped from averring the general proposition that this deed is bad. I certainly do not think that he can be estopped from setting up the avoidance of the deed merely in order to enable the trustee not to lose the commission which he would earn in the future from

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continuing to act as trustee and winding up this estate. That is my difficulty, and I am bound to say that I see difficulty in holding that the debtor is estopped in these proceedings against the trustee, although it is extremely probable that he is estopped against at any rate some of the creditors. He may be; he may not be. None of the creditors are parties to the motion. No arrangement has been made by which various classes of creditors can put their view before the Court, and I certainly should not see my way in any view to granting this application in a proceeding of this kind. I think if this application were made and entertained it ought to be an application in which not only the trustee is a party, but in which opportunity has been given to every set of creditors whose rights have been affected under the deed to be represented so that an order might be made which would work out the rights of the parties and limit the relief consequential upon the avoidance of the deed in the fullest possible way.

Therefore I agree in the result of this application, that it must be dismissed with costs.

Appeal dismissed. Leave to appeal granted.

J. E. A.

The debtor appealed.

Nov. 5. On the opening of the appeal,

E. W. Hansell (*Graham Milward* with him) renewed the preliminary objection to the jurisdiction which he took in the Divisional Court and repeated the arguments which he there used in support of the objection.

McCall, K.C., and *Tindale Davis*, for the appellant.

LORD COZENS-HARDY M.R. This appeal raises an extremely important question, namely, whether the Court of Bankruptcy has any jurisdiction conferred upon it by the Deeds of Arrangement Act, 1914, to declare that a deed of arrangement is void on an application made for that purpose.

The point was raised before the Divisional Court, though not before the county court. Horridge J. did not fully deal with it,

though he said that there was in his opinion jurisdiction. Rowlatt J. in his judgment assigns reasons which to my mind are very strong to show that no jurisdiction is given in a case of this kind. It all depends upon the language of s. 23. Only certain applications can be made under that section. In the first place it defines the persons who may make the application. The trustee is one person, the debtor is another, and any creditor entitled to the benefit of such an arrangement is another. In the present case the application was made by the debtor. There was a trust deed the trustee of which was the respondent to the summons. What sort of applications can be made under this new jurisdiction conferred by s. 23? Any one of this class of applicants may apply for the enforcement of the trust. Clearly this case does not come within that. It is not an application for the enforcement of the trust; it is an application for a declaration that there are no trusts to be enforced. Then is it a determination of the questions under it? In my opinion it is not. The object of the application is to establish that there is no "it," if I may say so, under which an application can be made. I feel that I am only repeating inadequately the observations of Rowlatt J., who according to his reasoning decided that there was no jurisdiction; but finally he thought it would be inconvenient and not in consonance with the present policy of legislation, or a thing which the Legislature intended, and therefore, against his own opinion, he held that there was jurisdiction and so decided. In my opinion statutory jurisdiction was for the first time given by s. 23. We are limited to the language used, and in my opinion we ought to hold that the Court having jurisdiction in Bankruptcy had no jurisdiction to declare this deed void.

BANKES L.J. I agree with some hesitation, because I think the language of the section is possibly capable of two constructions, but on the whole I think that the view expressed by the Master of the Rolls is the better view. The section gives a right to three persons or classes of persons to make an application. The persons entitled are the trustee, the debtor, or any creditor entitled to the benefit of the deed of arrangement. These are the three classes of persons who are entitled to go to the Court. What they are entitled to go to the Court for is to ask for the enforcement of the

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trusts or the determination of questions under the deed. The expression "determination of questions under the deed" is a very vague and loose expression, and I think it is capable of either construction, but taking the section as a whole I prefer the hitherto accepted view that what the section contemplates is a class of applications which are made upon the assumption that the deed is a valid and operative deed. For these reasons I think in this case I ought to hold that there was no jurisdiction in the county court ab initio to entertain this application, and that the order of the county court was an inoperative order, and that it is open to the debtor to make a proper application in the Chancery Division which would have the same effect as his original application to the county court.

WARRINGTON L.J. I am of the same opinion. The jurisdiction is given by s. 23 of the Act in these terms: "Any application by the trustee"—I am reading it shortly—"or by the debtor or by any creditor entitled to the benefit of such a deed of arrangement, for the enforcement of the trusts or the determination of questions under it, shall be made to the Court having jurisdiction in bankruptcy." I cannot bring myself to think that an application the object of which is to have it decided that there is no deed can come under the definition of an application for the "determination of questions under it." It seems to me that the section contemplates the existence of a deed of which there is a trustee, and under which there are creditors entitled to the benefit of it, and that that assumption runs through and governs the construction of the entire section. The question here is somewhat analogous to questions which are sometimes raised under the rules of Court governing the High Court with reference to the procedure upon originating summons. Jurisdiction was given to the judge in chambers to determine certain questions under a deed of settlement for example. It has always been held, so far as my experience goes, that any application seeking to avoid a deed must be brought by an action commenced by writ and not by originating summons, and that the judge in chambers would have no jurisdiction on an originating summons to entertain such an application. I think this case is analogous to that class of cases, and I think, therefore, that on the

true construction of this section the present application is one in which the county court had no jurisdiction and in which the Divisional Court had no jurisdiction.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co., for Ansell & Sherwin, Birmingham; Miller & Smiths, for Hall, Pratt & Pritchard, Bilston.*

NOTE.—Deeds of Arrangement Act, 1914 (4 & 5 Geo. 5, c. 47), s. 1, sub-s. 1: "A deed of arrangement to which this Act applies shall include any instrument of the classes hereinafter mentioned whether under seal" or not—

. . . . . ."

Sub-s. 2: "The classes of instrument hereinbefore referred to are . . . . in cases where creditors of the debtor obtain any control over his property or business—

. . . . . .

"(*e*) Any agreement or instrument entered into for the purpose of carrying on or winding up the debtor's business, or authorising the debtor or any other person to manage, carry on, realise or dispose of the debtor's business with a view to the payment of his debts."

Sect. 2: "A deed of arrangement shall be void unless it is registered with the Registrar of Bills of Sale under this Act within seven clear days after the first execution thereof by the debtor or any creditor . . . ."

Sect. 3, sub-s. 1: "A deed of arrangement, which either is expressed to be or is in fact for the benefit of a debtor's creditors generally, shall be void unless . . . . it has received the assent of a majority in number and value of the creditors of the debtor."

Sub-s. 2: "The list of creditors annexed to the affidavit of the debtor filed on the registration of the deed of arrangement shall be prima facie evidence of the names of the creditors and the amounts of their claims."

Sub-s. 5: "In calculating a majority of creditors for the purposes of this section . . . . creditors whose debts amount to sums not exceeding ten pounds shall be reckoned in the majority in value but not in the majority in number."

Sect. 5, sub-s. 1: "The registration of a deed of arrangement under this Act shall be effected in the following manner:—

"A true copy of the deed, and of every schedule or inventory thereto annexed, or therein referred to, shall be presented to and filed with the registrar within seven clear days after the execution of the deed . . . . together with an affidavit verifying the time of execution, and containing a description of the residence and occupation of the debtor, and of the place or places where his business is carried on, and an affidavit

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by the debtor stating the total estimated amount of property and liabilities included under the deed, the total amount of the composition (if any) payable thereunder, and the names and addresses of his creditors."

Sect. 11, sub-s. 2: "If a trustee under a deed of arrangement fails to comply with the requirements of this section, the Court having jurisdiction in bankruptcy in the district in which the debtor resided or carried on business at the date of the execution of the deed . . . . may declare the deed of arrangement to be void . . . ."

Sect. 23: "Any application . . . . by the debtor . . . . for the enforcement of the trusts or the determination of questions under" a deed of arrangement for the benefit of the debtor's creditors generally "shall be made to the Court having jurisdiction in bankruptcy in the district in which the debtor resided or carried on business at the date of the execution of the deed."

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Dec. 3, 6, 7.

[IN THE COURT OF APPEAL.]

ANDREW MILLAR & CO., LIMITED *v.* TAYLOR & CO., LIMITED.

Contract—Sale of Goods for Export—Declaration of War—Embargo on Exportation—Illegality—Impossibility of Performance—Temporary Suspension—Reasonable Time.

In July, 1914, the plaintiffs agreed to supply the defendants with confectionery for export. War against Germany was declared on August 4. By Proclamations of August 5 and 10 the exportation of confectionery was forbidden. The plaintiffs repudiated the contract and brought an action for the value of goods sold and delivered by them to the defendants. The defendants counter-claimed for breach of contract, and there was a plea to the counter-claim that the contract had been dissolved by the embargo declared by the Proclamations. On August 20 the prohibition of exportation of confectionery was removed:—

Held, reversing the decision of Rowlatt J. [1915] W. N. 116, that this was not a case of trading with the enemy, and the contracts had not been annulled but suspended. The plaintiffs should have waited a reasonable time before repudiating the contract, and the defendants were entitled to recover on their counter-claim.

APPEAL from a decision of Rowlatt J., reported [1915] W. N. 116.

The action was brought under Order XIV. by Andrew Millar & Co., manufacturers of confectionery at Belfast, against Taylor & Co., merchants carrying on business at Liverpool and London, for 71*l.*

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for the price of goods sold and delivered. There was no dispute about the validity of this claim, except on the ground that the orders had not been completed, but the defendants put in a counter-claim for 211*l.* for damages for breach of contract for non-delivery of goods contracted to be delivered by the plaintiffs. The figures had been agreed.

By various contracts made in June and July, 1914, the plaintiffs had agreed to deliver to the defendants large amounts of confectionery for export to Mogador. The confectionery was to be of different kinds, and packed in boxes fit for travelling, at a fixed price based on the price of sugar. The plaintiffs paid duty on the sugar when they imported it, and received a corresponding drawback on it through the Custom House when they exported it in the form of confectionery as directed by the defendants. The usual course of business between the parties was to make contracts on printed order forms, specifying the goods desired, packed in a particular way, to be forwarded to f.o.b. Liverpool, the goods supplied to bear only the defendants' marks and to be made up and stamped in accordance with the Merchandise Marks Act of the country to which the goods were being shipped. The contracts showed that the goods were for export to Morocco. Delivery was to be made as soon as possible, and the evidence showed that in the usual course of business the time taken to deliver the goods was generally about six weeks or two months from the date of the contract. It was alleged to be an implied condition of the contract that the goods should be exported and the plaintiffs should get the drawback.

On August 4, 1914, war was declared, and on August 5 a Proclamation was published as follows: "Now, we, by and with the advice aforesaid, do hereby order and direct that from and after the date hereof the following goods, being articles which we have judged capable of being converted into or made useful in increasing the quantity of military or naval stores, that is to say:—Forage and food of all kinds for animals, and also provisions and victual of all sorts which may be used as food for men, shall be, and the same are hereby prohibited to be exported from the United Kingdom."

The remaining facts were stated by Swinfen Eady L.J. as follows: That Proclamation of August 5 extends to "provisions and victual

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of all sorts which may be used as food for men"; and by the next Proclamation of August 10 it is directed "that the terms 'provisions and victual of all sorts which may be used as food for men' which by our said further Proclamation dated 5th August, 1914, we prohibited to be exported, shall mean and include:— . . . . Sugar, unrefined; sugar, refined and candy; confectionery of all kinds, including marmalade, jams, and fruit jellies." Now the effect of that was to prohibit the export from the United Kingdom of the goods in question. Nothing turns really upon the question whether the prohibition of export as embraced in the Proclamation of August 5 included confectionery, or whether confectionery was not included until August 10. My own view is that the language of the Proclamation of August 10 explaining the Proclamation of August 5 saying that it "shall mean and include" means that as from August 5 confectionery, which was of course edible, was embraced in the phrase "food for men." But however that may be, certainly confectionery was prohibited on August 10. On August 20 there was a further Proclamation, the effect of which is to substitute for the "provisions and victual used as food for men" certain things, including sugar unrefined and sugar refined and candy, but not including confectionery. So that at least this is clear, that on August 10 and as from August 10, if not previously, confectionery was forbidden to be exported and as from August 20 it was not forbidden; so that the duration of time during which the export of confectionery was prohibited is between either the 5th or 10th and the 20th of August—ten days, or at most fifteen days.

Now it appears from the correspondence that on August 3 the plaintiffs enclosed their account to date against the defendants and asked for a cheque by return. On the 4th the defendants answered: "Regarding confectionery orders ready for shipment. We regret we cannot yet give you any shipping instructions until we see how matters are going in the present crisis, as the steamship companies will not accept any cargoes for Morocco just now, and as a matter of fact we are holding back the ten cases which you have already sent us to London." On August 6, in answer to the application for money, they said that "owing to the present disturbance in the financial world we regret we must ask you to

allow the account to stand over for a short time," adding as a postscript "Our business is entirely dislocated." Again on August 8, "Our business is completely stopped," and they could not send the money at once. Then on August 12 the Manufacturing Confectioners Alliance, Limited, on behalf of the plaintiffs, asked for a settlement of the plaintiffs' account amounting to 100*l.* 19*s.* 10*d.* On August 14 a cheque for 30*l.* is sent on account. That letter crossed one from the plaintiffs at Belfast, which led up to this action. The plaintiffs say: "Referring to your recent letter in which you mentioned that your business in confectionery was suspended, of course you quite understand that we have cancelled any orders on hand for either Liverpool or your London branch, which please note." It will be observed that there is no reason for cancelling any orders; this is four days only after the Proclamation of the 10th, and it follows upon correspondence about money. On the 18th the defendants object to that. "Your treatment of us does not appear to us to partake of British characteristics. We have never told you we cancelled our orders." On the 25th the plaintiffs write: "Referring to the letter of the 18th inst. relative to some orders which were on hand for you, and which have been cancelled by us, we note you state you do not wish them cancelled, but in view of your letter of 8th inst. we cannot do otherwise and would ask you to note accordingly." That letter of the 8th which I have already read was of course before the Proclamation of the 10th. Then on September 15 the matter is placed in the hands of the lawyers, and then for the first time the plaintiffs seek to justify under the Proclamation, and their lawyers say on September 15: "Our clients, Andrew Millar & Co., Ltd., have consulted us with reference to correspondence which has taken place with you relative to certain contracts which were pending on the 5th August last, and which they in view of certain Proclamations refused to proceed with, and in respect of which you have sent them a debit note." That was the first time objection was taken that they were entitled to refuse by reason of the Proclamations. They go on to say: "Our clients were therefore justified in treating the contracts as discharged by operation of law and in refusing to make further deliveries."

The parties were at arm's length; an action was brought for

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goods sold and delivered, and a counter-claim for breach of contract for refusing to proceed with the contract and refusing to deliver the goods on order.

Rowlatt J. gave judgment for the plaintiffs on the claim in the action, and held on the counter-claim that the contracts had been dissolved and could not be reinstated.

Taylor & Co. appealed.

Austin Farleigh and *H. Walter Samuel*, for the appellants. The learned judge has held that the effect of the Proclamations was to terminate the rights of the parties under the contract. There are two questions—(1.) whether there was any condition binding the appellants to export the goods; and (2.) if so, was the effect of the Proclamations to terminate rather than suspend the contract. The submission is that the embargo upon export suspends and does not annul the contract. The conditions of the contract entitled the appellants to alter the marks on the goods. When the goods were delivered at Liverpool the appellants could deal with them as they liked, and it is not to be presumed that they would deal with them unlawfully. The promise to export the goods was not a condition precedent to the respondents' obligation to manufacture them for the appellants. The Proclamations prevent the appellants from exporting the goods, but the obligation to supply them remains in force. The embargo does not terminate the rights under the contract, but merely suspends the performance of it: *Smith, Coney & Barrett* v. *Becker, Gray & Co.* (1) From a political point of view it was not likely that this prohibition would be more than merely temporary. In 1796 there was a similar proclamation putting an embargo upon ships plying between England and Tuscany. It remained in force until 1798. It was held in *Hadley* v. *Clarke* (2) that the contract there in question was not terminated, but the rights under it were merely suspended. Rowlatt J. said that that case was governed by part performance. There was part performance here.

The question is whether the rights of the contracting parties were suspended or terminated by the Proclamations of August 5 and 10, 1914. No time was fixed by the contracts for manufacture,

(1) (1915) 31 Times L. R. 151. (2) (1799) 8 T. R. 259.

delivery, or export of the goods; that was to be done within a reasonable time, according to the practice of the parties, as found by Rowlatt J., within six weeks or two months. The appellants contend that the Proclamations did not put an end to the contracts altogether, but suspended their operation for a reasonable time. Since August 20 business of this kind has been carried on as usual. There is no distinction between this case and cases of embargo on shipping; and the question is the reasonableness of the time during which the contract is suspended: *Jackson* v. *Union Marine Insurance Co.* (1) If the delay is so long as to frustrate the object of the contract it may be regarded as at an end. But although contracts of this nature which involve trading with the enemy are dissolved by the breaking out of war, of which no person can foresee the termination, yet they are not dissolved by an embargo or temporary restraint of their performance imposed by the Government of the country in whose ports the vessel may happen to be: Abbott on Ships and Seamen, 14th ed., p. 874; *Hadley* v. *Clarke.* (2) In the present case the contract was partly performed and could not be terminated by a prohibition. The Proclamations only imposed a temporary restriction; there was at that time no fixed and permanent policy in the mind of the Government. *Hadley* v. *Clarke* (3) was approved of in *Touteng* v. *Hubbard* (4) and in Abbott on Ships and Seamen, 5th ed., p. 429. It is not affected by *Langton* v. *Hughes* (5), where the contract was illegal to the knowledge of the parties. *Barker* v. *Hodgson* (6) and *Medeiros* v. *Hill* (7) are in our favour. The Proclamations did not necessarily dissolve the contract unless the contract involved trading with an enemy. There is a clear distinction between the effect of a declaration of war and a temporary embargo: *Avery* v. *Bowden.* (8) An embargo is an arrest laid on ships or merchandise by public authority: Park on Marine Insurance, 8th ed., p. 168. In *Melville* v. *De Wolf* (9) it was held that the contract of service of a seaman had been dissolved, but that was because it had become impossible of performance. To

(1) (1873) L. R. 8 C. P. 572; (1874) L. R. 10 C. P. 125.
(2) 8 T. R. 259, 265.
(3) 8 T. R. 259.
(4) (1802) 3 Bos. & P. 291.
(5) (1813) 1 M. & S. 593.
(6) (1814) 3 M. & S. 267.
(7) (1832) 8 Bing. 231.
(8) (1855) 5 E. & B. 714; (1856) 6 E. & B. 953.
(9) (1855) 4 E. & B. 844.

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dissolve a contract it must be shown that an embargo such as this has put an end to it as involving illegal trading with enemies: *Esposito* v. *Bowden* (1); *Beale* v. *Thompson* (2); *Geipel* v. *Smith*. (3) An embargo, though of an indefinite duration, merely suspends the performance of the contract: *Jackson* v. *Union Marine Insurance Co.* (4), in which *Hadley* v. *Clarke* (5) was approved and American cases were cited; Maude and Pollock on Merchant Shipping, 4th ed., p. 324; Kent's Commentaries on American Law, 12th ed. vol. 3, p. 249. This contract was partly performed and was no longer executory and could not be dissolved: *Nobel's Explosives Co.* v. *Jenkins & Co.* (6); *Bensaude* v. *Thames and Mersey Marine Insurance Co.* (7); *Embiricos* v. *Sydney Reid & Co.* (8); *Baily* v. *De Crespigny* (9); *Ware* v. *Chappell*. (10)

Maddocks, for the plaintiffs, Andrew Millar & Co. The decision of Rowlatt J. was right. It was a term of this contract that the goods should be exported, and by the Proclamations this was prohibited and the contract became impossible of performance and was dissolved: *Lightfoot* v. *Tenant* (11); *Barker* v. *Hodgson*. (12) The contract was at once made illegal and dissolved and could not be reinstated. That is the clear effect of s. 8 of the Customs and Inland Revenue Act, 1879 (42 & 43 Vict. c. 21). The object of the engagement was frustrated on the spot within *Jackson* v. *Union Marine Insurance Co.* (13)

[SWINFEN EADY L.J. The question is whether the embargo did not cause a temporary prohibition only.]

The declaration of war was enough to put an end to the contract: *O'Neil* v. *Armstrong, Mitchell & Co.* (14) As soon as the Proclamations were made the contracts terminated: *Esposito* v. *Bowden*. (1) There is nothing in this contract to show that its operation will only be suspended by an embargo; there is nothing in it about reasonable time.

(1) (1857) 7 E. & B. 763.
(2) (1804) 4 East, 546.
(3) (1872) L. R. 7 Q. B. 404.
(4) L. R. 10 C. P. 125, 136, 137.
(5) 8 T. R. 259.
(6) [1896] 2 Q. B. 326.
(7) [1897] A. C. 609.
(8) [1914] 3 K. B. 45.
(9) (1869) L. R. 4 Q. B. 180.
(10) (1649) Sty. 186.
(11) (1796) 1 Bos. & P. 551.
(12) 3 M. & S. 267.
(13) L. R. 8 C. P. 572.
(14) [1895] 2 Q. B. 418.

It is said that we must wait a reasonable time, and if the embargo is removed within such a time the contract remains valid. But there is nothing to that effect in the contract, and the question depends on the terms of the contract. We had the right to repudiate the contract till the embargo was withdrawn. The contract had been dissolved by the supreme authority of the State just as much as if it had been a case of illegal trading with the enemy: *Melville* v. *De Wolf*. (1) *Hadley* v. *Clarke* (2) was decided with some doubt, and it turned on the terms of the contract and the particular facts of the case, including the circumstance that the contract had been partly performed, which is not the case here. The decision is inconsistent with some of the later cases: *Hurst* v. *Usborne* (3); *Dahl* v. *Nelson, Donkin & Co.* (4); *Geipel* v. *Smith* (5); *Duncan, Fox & Co.* v. *Schrempft & Bonke*. (6) The goods were perishable and it was reasonable to annul the contracts.

No reply was called for.

SWINFEN EADY L.J. stated the facts and continued: Now it will be observed that the first of the Proclamations was issued on August 5, immediately after a state of war became known. It was only on the night of August 4 that a state of war existed. On August 5 there is a Proclamation in wide and comprehensive terms; then on the 10th there is a Proclamation in more detailed terms. It is obvious that at that time the Government of the country was taking the steps that appeared to them to be proper under the urgent circumstances of the moment, acting from day to day having regard to facts as they arose or came to their knowledge, considering the position of affairs and determining the proper course to be taken. The Proclamations of the 10th and the 20th show that. But in my opinion, having regard to the circumstances under which those Proclamations were made, it was impossible just at that time, at or about the dates of the Proclamations, to know whether the prohibition enforced by the Proclamations would last for any considerable time, and it was probable that in the course of a few days the position would

(1) 4 E. & B. 844.
(2) 8 T. R. 259.
(3) (1856) 18 C. B. 144.
(4) (1881) 6 App. Cas. 38.
(5) L. R. 7 Q. B. 404, 410.
(6) [1915] 3 K. B. 355.

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become clearer as the situation developed. By the 20th it had become much clearer and the export of confectionery and other things, previously prohibited, was then allowed.

Now the question is whether the plaintiffs, Millar & Co., were entitled under the circumstances to refuse to carry out their contract. They refused on the 14th, four days after the Proclamation of August 10, and it is contended that the effect of the Proclamation was to render the export of confectionery illegal, and therefore the contract becoming illegal it was dissolved. I should say that the statutory enactment dealing with the prohibition by proclamation of the export of goods is s. 8 of the Customs and Inland Revenue Act, 1879, and that provides as follows, reading it shortly: "That naval and military stores, provisions or any sort of victual which may be used as food for man, may by Proclamation or Order in Council be prohibited either to be exported or carried coastwise, and if any goods so prohibited shall be exported or brought to any quay or other place to be shipped for exportation from the United Kingdom or carried coastwise, or be water-borne to be so exported or carried, they shall be forfeited, and the exporter or his agent or the shipper of any such goods shall be liable to the penalty of one hundred pounds."

Now the argument on behalf of the plaintiffs is this: the effect of the Proclamation was to render the export of the goods illegal, and the exporter or shipper would be liable to a penalty of 100*l.*, and therefore the plaintiffs were released from further proceeding with the contract. The general rule of law is that where the performance of a contract has been rendered illegal and therefore impossible by Act of Parliament passed after the contract was made, or by an act of State, which of course would include the Proclamation, then the promisor is excused from performing his promise. In *Barker* v. *Hodgson* (1) Lord Ellenborough said: "If indeed the performance of this covenant had been rendered unlawful by the Government of this country, the contract would have been dissolved on both sides, and this defendant, inasmuch as he had been thus compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages." But in the application of this rule care must be taken

(1) 3 M. & S. 267, 270.

to consider whether an event which has happened has really rendered the performance of the contract impossible, or merely operated to suspend or delay its execution. If, for instance, the act of State consists in placing an embargo upon ships leaving the kingdom for particular places abroad, the Courts have held, even when the delay has been very considerable, that the rights under charterparties have only been suspended. Thus in *Hadley* v. *Clarke* (1) it was held that although the period of suspense was in that case extreme—between two and three years—yet if the effect of an act of State is not to render the completion of the contract impossible but only to delay its execution temporarily and for a reasonable period, and does not frustrate the object of the engagement from a business point of view and as a mercantile adventure, the promisor is not excused, but must perform the contract; that is to say, he must perform it within a reasonable time after the difficulty has been removed.

In *Jackson* v. *Union Marine Insurance Co.* (2) the plaintiff, a shipowner, had entered into a charterparty to proceed from Liverpool to Newport and there load a cargo of iron rails for San Francisco. The ship sailed on January 2, 1872, and on the 3rd got aground in Carnarvon Bay, and from that time to the end of August was taken up with the repairs to the vessel. The Exchequer Chamber affirmed the decision of the Court below, that by reason of the delay the charterers were not bound to load the ship, and therefore there was a loss of the chartered freight by perils of the sea. Bramwell B. put it in this way: "I understand that the jury have found that the voyage the parties contemplated had become impossible; that a voyage undertaken after the ship was sufficiently repaired would have been a different voyage, not, indeed, different as to the ports of loading and discharge, but different as a different adventure,—a voyage for which at the time of the charter the plaintiff had not in intention engaged the ship, nor the charterers the cargo; a voyage as different as though it had been described as intended to be a spring voyage, while the one after the repair would be an autumn voyage." That is to say, the voyage had become impossible. Then he put this illustration: "Thus, A. enters the service of B., and is ill and

(1) 8 T. R. 259. (2) L. R. 10 C. P. 125, 141, 145.

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cannot perform his work. No action will lie against him; but B. may hire a fresh servant, and not wait his recovery, if his illness would put an end, in a business sense, to their business engagement, and would frustrate the object of that engagement; a short illness would not suffice, if consistent with the object they had in view." In *Melville* v. *De Wolf* (1) the British Consul at Montevideo had sent home a British mariner, a ship's carpenter, to give evidence at the trial of the captain for shooting one of the crew on the high seas; it was held that the seaman could not recover wages for the unexpired period of the contract. Lord Campbell, in delivering the judgment of the Court, said: "We think that the contract must then be considered as dissolved by the supreme authority of the State, which is binding on both parties." What had happened was that the British Consul at Montevideo acted under statutory powers, as he was empowered to do by his Government, and had sent the mariner home to give evidence, thus suspending his contract to serve on board the ship. The mariner could not rejoin the ship; that appears from the facts of the case; he attended and gave evidence, and subsequently could not rejoin his ship for the rest of the voyage. It appears that during the course of the argument, where several instances were put, Lord Campbell intervened and said: "These are but temporary interruptions." Those were the instances that were put. Then the argument proceeded: "Practically in this case the mariner could not return to his ship as it was in the Pacific Ocean at the time." Lord Campbell said: "By authority of the British Legislature" the mariner "was separated from his ship at a foreign port, and sent to England, without any reasonable possibility of his ever being able to rejoin the ship during the voyage in which she was engaged." So that the distinction is pointed out between the happening of an event which may cause a temporary interruption and the occurrence of an event, in this case equivalent to an act of State, which rendered the performance of the contract impossible. "We think the contract must then be considered as dissolved by the supreme authority of the State, which is binding on both parties." Now I think it is clear that that decision was expressly based upon the fact that the interruption to the mariner's employ-

(1) 4 E. & B. 844, 848, 849.

ment on the ship was not merely temporary. Then in *Geipel* v. *Smith* (1) it was held that the shipowners were justified in not carrying out the charterparty, the reason being that the performance within a reasonable time was prevented by an excepted cause, namely, the blockade of Hamburg by the French fleet, which was a "restraint of princes." Cockburn C.J. said (2) it was a "restraint of princes." Then there is this passage: "It would be monstrous to say that in such a case the parties must wait—for the obligation must be mutual—till the restraint be taken off—the shipper with cargo, which might be perishable, or its market value destroyed—the shipowner with his ship lying idle, possibly rotting—the result of which might be to make the contract ruinous. At all events it must be taken that the restraint must cease within a reasonable time, and that the duty of the defendants was to wait only a reasonable time prepared to carry out their contract should the restraint be removed; but the defendants rest their defence on the ground that it was here impossible to expect, from the nature of the circumstances, that the obstacle of the blockade would be removed within a reasonable time." So Blackburn J. said (3): "I take the effect of such a state of things as an effective blockade of the port of discharge is not merely to excuse delay in the carrying out of the contract, but that, after a reasonable time, it relieves the parties, the contract being altogether executory, from the performance of it." Then in a passage at p. 413: "The object of each of the parties was the carrying out of a commercial speculation within a reasonable time; and if restraint of princes intervened and lasted so long as to make this impossible, each had a right to say, 'Our contract cannot be carried out'; and, therefore, the shipowner had a right to sail away, and the charterer to sell his cargo or refrain from procuring one, and treat the contract as at an end." Then: "But then it is said, it is possible the blockade might be raised within a reasonable time. No doubt it was possible. But it must be taken on this record that it was not raised within a reasonable time; so if the defendants chose to run the risk, and in the event turn out right, they are in the same position as if they had waited the reasonable time and had then

(1) L. R. 7 Q. B. 404. (2) L. R. 7 Q. B. 410.
(3) L. R. 7 Q. B. 412, 413, 414.

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sailed away. Possibly, had they turned out wrong, the plaintiffs would have been entitled to say, 'We were ready and willing to put a cargo on board, you chose to take your chance, and have turned out wrong, therefore we have a cause of action against you.' But the defendants here were right, and there never was a time when the plaintiffs could say, 'We are ready and willing and able to perform our contract.'" Then Lush J. refers to the sixth and seventh pleas, and then says this (1): "I think the fifth plea may also be treated as valid. It alleges the breaking out of a war between France and Germany, and a blockade of the port of Hamburg. If the impediment had been in its nature temporary I should have thought the plea bad; but a state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this."

To the same effect is the decision in *Nobel's Explosives Co.* v. *Jenkins & Co.* (2)

Now the plaintiffs relied upon cases such as *Esposito* v. *Bowden* (3) which show that where a contract involves trading with an enemy it is illegal. No doubt that is so: a contract involving trading with the enemy becomes at once ipso facto illegal; and the ground of that is put by Lush J. in *Geipel* v. *Smith* (1) as "a state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this." All trading with the enemy is prohibited, and that condition of things must be presumed to last for an indefinite time; it renders all contracts involving such trading illegal and impossible of further performance, and therefore they become void. In the present case if the interruption were such that the contract could not be carried out in a reasonable time, then it would invalidate the contract. If, on the other hand, the interruption is such that it does not prevent the agreement being carried out within a reasonable time, having regard to the terms of the contract itself, then a mere temporary interruption does not annul the contract. In this case the agreement was to manufacture and deliver goods

(1) L. R. 7 Q. B. 414. (2) [1896] 2 Q. B. 326.
(3) 7 E. & B. 763.

within a reasonable time, no other time being specified, and the course of business between the parties shows that from six weeks to two months was the usual and reasonable time. If, therefore, an event happens which does not prevent the contract being carried out within that reasonable time and in accordance with the usual course of business between the parties, there is no reason why the contract should be thereby determined; and, having regard to the Proclamations that were issued on August 5, 10, and 20, I am of opinion that it was the duty of the plaintiffs to have waited a reasonable time for the purpose of seeing whether it were possible to fulfil their contract. If they had waited, the contract could have been carried out as usual without any difficulty; if they had waited until August 20—a short interruption for ten or at the most fifteen days—the contract could have been carried out without difficulty. The suspension caused by the embargo on exportation was a temporary suspension for a short period and did not prevent the contract being carried out in the manner in which the parties had contemplated that it would be carried out. For these reasons I am of opinion that under the circumstances the plaintiffs were not entitled to repudiate the contract and refuse to perform it. It is a breach by them of that contract, and the defendants are entitled to recover against the plaintiffs, giving credit for the agreed sum which the defendants owed to the plaintiffs. In my opinion the appeal ought to be allowed in respect of the counter-claim, the judgment reversed, and judgment entered for the defendants.

WARRINGTON L.J. stated the facts and proceeded: The question is whether the plaintiffs were right in treating their contracts as at an end, as they did, and on that ground refusing to perform them. It seems to me that the law stands thus—I do not propose to go through the authorities, but to state what in my view is the result of them—that if by reason of circumstances, which may be either an Act of Parliament or an act of State, such as a proclamation, or the principles of common law, such as the illegality of trading with an enemy after the outbreak of war, the performance of a contract becomes impossible by reason of its illegality, then both parties to the contract are discharged. But they are only discharged because the performance of the contract becomes impossible. It is

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necessary, therefore, in all cases to ascertain what is the contract the performance of which is said to have become impossible. Now in this particular case the contract as to which the question arises is one to deliver goods within such time as is reasonably possible—in other words, within a reasonable time. Has that contract become impossible in the events which have happened? If the illegality had consisted in trading with the enemy, then I think there is no question that it would have been held that the performance of the contract had become impossible, because the illegality in that case arises ipso facto from the state of war, and the Courts have always treated a state of war as a state the duration of which it is impossible to foresee; the duration depends not on the will of the Government of this country, but on a number of other considerations all of which are as uncertain as any such considerations can be. Therefore, as stated in the early editions of Abbott on Ships and Seamen, the outbreak of war renders commercial contracts which involve trading with the enemy, and therefore involve a breach of the common law, illegal and impossible of performance, and the parties thereto are discharged. But the case is different where the illegality arises not from the state of war itself, but from an act of the Executive Government, such as the imposition of an embargo or the imposition of a prohibition such as that with which we have to deal in the present case. In that case you have to consider whether that particular embargo or prohibition has rendered the particular contract impossible of performance.

Now, as I have already said, the particular contract which we have to consider is one which was to be performed within a reasonable time. Has the act of State in fact rendered the contract impossible of performance within a reasonable time? It plainly has not; it expired on August 20, before the time had arrived within which, even according to the ordinary practice in peace time, the contract would have been performed, and there is nothing to indicate that it would have been impossible to perform this contract after the removal of the prohibition on August 20. The plaintiffs—the defendants in the counter-claim, the plaintiffs in the action—have chosen to run the risk that of course they were entitled to do, and if the prohibition had lasted so long that the contract in

fact turned out to be impossible of performance then they would have been right. Having taken the course of not waiting the reasonable time before they chose to treat the contract as at an end, they had to take the consequences of it having turned out as it in fact has turned out, that the contract was capable of performance.

In my opinion, for these reasons, the judgment of the learned judge was wrong, and this appeal ought to be allowed and judgment given for the defendants in the action.

BRAY J. I agree that this appeal should be allowed. The facts have been fully stated, and it is only necessary that I should deal with the point of law raised. Now the first question raised by Mr. Farleigh was whether the defendants were by the contract under an obligation to export the goods when they received them. It is quite clear that the contract did contemplate that the goods would be exported, and the course of business showed that, in that event, after they had been exported the plaintiffs would receive the drawback. It may be a question, and a difficult question, as to what was the implied term of the contract with reference to exportation, but I will assume in favour of the plaintiffs, without deciding it, that there was an implied term of the contract by which the defendants promised to export the goods so that the plaintiffs might get their drawback. That being so, two points arose; the first question was whether such a promise was a condition or an independent promise. One must look at the general circumstances to see which it was. Now the breach first of all involves only a question of money, a comparatively small amount of money, but only a question of money, namely, the amount of the drawback. The next circumstance is that the breach would not under ordinary circumstances occur until after the plaintiffs had delivered the goods to the defendants at Liverpool. These considerations lead me to the clear conclusion that it was not a condition, but merely an independent promise.

The next question that arose was whether either of the Proclamations of August 5 and 10 dissolved the contract or only suspended it for a reasonable time. The law is thus stated in Abbott on Ships and Seamen, 14th ed., p. 874 (I am reading from what is part of

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the old edition): "But although contracts of this nature are dissolved by the breaking out of war or hostilities in the manner before mentioned, of which no person can foresee the termination; yet they are not dissolved by an embargo, or temporary restraint of their performance imposed by the Government of the country in whose ports the vessel may happen to be, as a measure of political caution in time of war, or upon the expectation of it, either in the lading port, or in a place at which the ship may have touched in the course of her voyage. This subject has received a judicial determination in the law of England." So that the learned author laid down this: that an embargo or temporary restraint—he is speaking all the time only of a ship—does not dissolve the contract. In my opinion, whether this be called an embargo or not, it is a temporary restraint of the same description as an embargo on a ship, and rests on the same principles. The later cases show, especially *Geipel* v. *Smith* (1) and *Jackson* v. *Union Marine Insurance Co.* (2), that after a reasonable time the contract is dissolved; and the reason of that is this: because by that time the performance of the contract would have been, from a business point of view, impossible. So that we have to consider here whether a reasonable time had arrived, because if it had not arrived the contract was not dissolved.

Now in fact the prohibition was removed on August 20, and when we look at the contract it is found that the plaintiffs had no fixed time, but a reasonable time, for delivery, which had not nearly expired, in fact did not expire until about the middle of September.

My opinion, therefore, is that a reasonable time had not arrived, the contract was not dissolved, and the plaintiffs are liable in damages to the defendants for their repudiation of the contract.

Appeal allowed.

Solicitors: *G. T. B. S. Thurnell; Harold Mayhew & Darling.*

(1) L. R. 7 Q. B. 404. (2) L. R. 8 C. P. 572.

H. C. R.

MILLER, GIBB & CO. *v.* SMITH & TYRER, LIMITED.

1915
Nov. 25.

Practice—Appeal—Order in Chambers—Order appointing Arbitrator—Submission to Arbitration disputed—Matter of Practice and Procedure—Rules of the Supreme Court, 1883, *Order* LIV., *r.* 23.

A contract for the sale of goods stated that in all disputes that might arise out of it all the parties expressly agreed to submit the same to arbitration. The contract was signed by the purchasers. The vendors purported to sell through the agency of brokers, and the contract was signed by the brokers "by the authority of our principals as agents." A dispute arose out of the contract owing to non-delivery of the goods or some of them. The purchasers called upon the brokers to appoint an arbitrator. The brokers refused to do so on the ground that they as mere agents were not parties to the submission to arbitration.

On the application of the purchasers an order was made by a district registrar for the appointment of an arbitrator. On appeal to a judge at chambers that order was discharged. The purchasers appealed to a Divisional Court:—

Held, that, as there was no cause or matter pending in the High Court, the appeal was not in a matter of practice and procedure within the meaning of Order LIV., r. 23, of the Rules of the Supreme Court, and therefore that the appeal lay to a Divisional Court and not to the Court of Appeal.

In re Colman and Watson [1908] 1 K. B. 47 distinguished.

In re Portland Urban Council and Tilley [1896] 2 Q. B. 98 and *In re Frere and Staveley Taylor & Co. and North Shore Mill Co.* [1905] 1 K. B. 366 discussed.

THE applicants, Messrs. Miller, Gibb & Co., bought under three contracts in July, 1914, and February, 1915, certain timber to be shipped at a foreign port, cost, freight, and insurance to Cape Town, and to be paid for by acceptance payable in London. The contracts were in the following form: "Contract by which our principals sell through the agency of Smith & Tyrer, Limited, wood brokers, Liverpool," (the respondents) "and Messrs. Miller, Gibb & Co. of Liverpool buy the goods specified below, foreign measure, of the usual manufacture and of the classification of the surveyors at the port of shipment. For shipment promptly. . . . ." The contracts contained the following clause: "In all disputes that may arise out of this contract all the parties expressly agree to submit the same to arbitration in England . . . . and in case any action

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is brought in any matter arising out of this agreement such action shall be brought in England and determined according to English law." The contracts were signed by Miller, Gibb & Co. and "By authority of our principals as agents Smith & Tyrer, Limited, Chas. T. Tyrer."

The real vendors were the E. Sondheimer Company, of Memphis, in the United States. There was an alleged failure to deliver under the first contract. Thereupon the applicants called upon the respondents to appoint an arbitrator so that the rights of the parties to the contract might be settled between Messrs. Smith & Tyrer and themselves. Messrs. Smith & Tyrer refused to appoint an arbitrator on the ground that they were not parties to the contracts, which they had signed merely as agents for their principals the merchants of Memphis.

The applicants then took out an originating summons before the Liverpool district registrar for the appointment of an arbitrator. The district registrar made the order as prayed. On appeal Younger J. in chambers discharged the order of the district registrar and cancelled the appointment.

The applicants appealed.

R. E. Gething, for the respondents, took the preliminary objection that the appeal lay not to the Divisional Court but to the Court of Appeal. This appeal is in a matter of "practice and procedure" within the meaning of the Supreme Court of Judicature (Procedure) Act, 1894, s. 1, sub-s. 4, and Order LIV., r. 23, of the Rules of the Supreme Court (1): *In re Colman and Watson* (2); *In re Portland Urban Council and Tilley*. (3) *In re Frere and Staveley Taylor & Co. and North Shore Mill Co.* (4) is inconsistent with the later case of *In re Colman and Watson*. (2) In *Denny, Mott & Dickson* v. *Standard Export Lumber Co.* (5) an appeal from an order of a judge in

(1) Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1, sub-s. 4: "In matters of practice and procedure every appeal from a judge shall be to the Court of Appeal."

Rules of the Supreme Court, 1883, Order LIV., r. 23: "In the King's Bench Division, except in matters of practice and procedure, the appeal from a decision of a judge at chambers shall be to a Divisional Court."

(2) [1908] 1 K. B. 47.

(3) [1896] 2 Q. B. 98.

(4) [1905] 1 K. B. 366.

(5) [1912] 2 K. B. 542.

chambers appointing an umpire went direct to and was heard by the Court of Appeal.

W. Greaves Lord, for the appellants. It is well settled that before there can be a matter of practice and procedure within the meaning of the Supreme Court of Judicature (Procedure) Act, 1894, s. 1, sub-s. 4, and the Rules of the Supreme Court, Order LIV., r. 23, there must be some cause or matter pending in the High Court: *Watson* v. *Petts* (1); *Long* v. *Great Northern and City Ry. Co.* (2) The whole question between these parties is whether there is such a cause or matter pending. The answer to that question depends upon whether there is a submission to arbitration between these parties. If there is a submission, then it may be that, according to *In re Colman and Watson* (3), there is a cause or matter pending in the High Court, because by s. 1 of the Arbitration Act, 1889, a submission, unless a contrary intention is expressed therein, has the same effect as if it had been made a rule of Court. But if there is no submission there is no cause or matter pending. In the present case the respondents' contention is that there is no submission. Consequently their preliminary objection, which could only succeed if there was a submission, must fail, and the appeal lies to this Court.

AVORY J. An objection has been taken that this is not the proper Court to entertain this appeal, but that it lies to the Court of Appeal on the ground that the matter is within the meaning of Order LIV., r. 23, a matter of practice and procedure. The question is one of some difficulty because the decisions seem somewhat contradictory. In *In re Portland Urban Council and Tilley* (4) it was held that an order made by a judge in chambers granting leave to revoke a submission to arbitration was a matter of practice and procedure. In *In re Frere and Staveley Taylor & Co. and North Shore Mill Co.* (5) it was held that an appeal did not lie to the Court of Appeal from an order of a judge in chambers ordering an arbitrator to state a case, on the ground that such an order was not a matter of practice or procedure. In *In re Colman and Watson* (3) it was held that an appeal from an order of a judge in chambers made on an application

(1) [1899] 1 Q. B. 54.
(2) [1902] 1 K. B. 813.
(3) [1908] 1 K. B. 47.
(4) [1896] 2 Q. B. 98.
(5) [1905] 1 K. B. 366.

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for leave to enforce an award on a submission to arbitration under the Arbitration Act, 1889, was an appeal in a matter of practice and procedure. Vaughan Williams L.J. based his judgment on the ground that by s. 1 of the Arbitration Act, 1889, a submission, unless the contrary intention is expressed therein, is irrevocable, except by leave of the Court or a judge, and is to have the same effect in all respects as if it had been made an order of Court. "Therefore," he says (1), "where there is a submission within the meaning of that section, the case must, I think, be treated as if that submission had been made an order of the High Court." That being so, an application for leave to enforce an award made upon a submission, being to all intents and purposes an application to enforce an order of the High Court, must be taken to be a matter of practice or procedure in that Court. In *Denny, Mott & Dickson* v. *Standard Export Lumber Co.* (2), disputes having arisen under the contract in question, the arbitrators to whom the disputes were referred failed to agree and failed to appoint an umpire. One of the parties then took out an originating summons asking for the appointment of an umpire by the Court. A Master in chambers appointed an umpire. On appeal direct to the Court of Appeal that Court affirmed the order, but it does not appear to have been argued whether the appeal was properly brought to the Court of Appeal. In my opinion the authority most in favour of the objection now taken is the judgment of Vaughan Williams L.J. in *In re Colman and Watson* (3) to the effect that if there is a submission to arbitration there is a matter of practice or procedure. In the present case the dispute is whether there ever was a submission between the parties. In order to decide that this appeal lies to the Court of Appeal we should have to decide that there was a submission to arbitration. That is the question between the parties. It cannot be said that we must decide the whole matter in dispute between the parties before deciding this preliminary point. The preliminary point therefore fails, and the appeal must be heard on its merits.

LUSH J. In this case the applicants took out an originating summons before the district registrar on an alleged submission to

(1) [1908] 1 K. B. 50. (2) [1912] 2 K. B. 542.
(3) [1908] 1 K. B. 47.

arbitration between themselves and the respondents. The respondents opposed the summons because they said that they had never agreed to submit matters to arbitration. That was the matter in controversy between the parties, and that was what the registrar had to decide. He held that there was a submission and made the appointment as prayed. The judge in chambers held that there was no submission and cancelled the appointment. The applicant appeals to this Court and asks us to restore the order of the district registrar. Is this an appeal in a matter of practice and procedure within the meaning of Order LIV., r. 23 ? It is clear that the mere fact that an application is made to a district registrar is not enough to establish a matter of practice and procedure in the High Court. It cannot be said that there is a cause or matter pending in the High Court merely because the High Court has been asked on an originating summons to make an order. If that were so, every time a party applies to a Master to make an order there would be a cause or matter pending in the High Court, so that all appeals from chambers without exception would necessarily go to the Court of Appeal. But it is well known that an appeal from an order for a writ of prohibition lies to this Court and not to the Court of Appeal. Therefore the mere fact that the High Court has seisin of a matter does not make it a matter of practice and procedure in a cause or matter pending in that Court. There must be some existing cause or matter in which the application is made. In the present case we cannot be asked to say that there is any cause or matter now pending in this Court because the controversy between the parties is whether the only cause or matter suggested, namely, a submission to arbitration, ever existed. Therefore it cannot be said that this summons was taken out in a cause or matter actually pending in this Court. The respondents who take this preliminary objection fail to establish before the appeal is heard that there is a cause or matter pending and that it is a matter of practice and procedure. In view of the later authorities I think that *In re Portland Urban Council and Tilley* (1) must be taken to be overruled. I do not see how it can be reconciled with *In re Frere and Staveley Taylor & Co. and North Shore Mill Co.* (2) In the latter case there was an existing submission ; nevertheless the Court of Appeal must have held that an

(1) [1896] 2 Q. B. 98. (2) [1905] 1 K. B. 366.

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order upon an arbitrator to state a case in that proceeding was not an order in a cause or matter pending in the High Court or a matter of practice and procedure in that cause or matter; otherwise the appeal would have lain to the Court of Appeal, whereas it was held that it lay to this Court. As I understand *In re Colman and Watson* (1), there had been an arbitration and an award had been made, and one of the parties sought to enforce the award. Now an award is to be enforced as if it were a judgment of the High Court. Vaughan Williams L.J. indeed says that the submission had the force of an order of the Court by virtue of the Arbitration Act, 1889. The Court of Appeal held that, inasmuch as the applicant was seeking to enforce an award which was to be treated as a judgment of the High Court, the award should be regarded as a cause or matter pending in the High Court and the application as a matter of practice and procedure therein. I do not think we should be right in treating *In re Frere and Staveley Taylor & Co. and North Shore Mill Co.* (2) as overruled by *In re Colman and Watson.* (1) In my opinion the appeal in the present case lies to this Court.

The Court then proceeded to hear the appeal on its merits. At the conclusion of the arguments,

AVORY J. This appeal must be dismissed. The only question we have to decide is whether the order of the district registrar should stand discharged or be restored. We think that order ought never to have been made. There being a dispute on the part of the respondents as to whether they were liable at all on these contracts, the registrar was wrong in making an order the effect of which would be to force them to arbitrate on the footing that they were liable upon them.

Appeal dismissed.

Solicitors for appellants: *Rawle, Johnstone & Co., for Laces, Wilson, Todd & Stone, Liverpool.*

Solicitors for respondents: *Batesons, Warr & Wimshurst, Liverpool.*

(1) [1908] 1 K. B. 47. (2) [1905] 1 K. B. 366.

W. H. G.

WILLIAMS AND ANOTHER, APPELLANTS *v.* ALLEN, RESPONDENT. 1915 *Dec.* 16.

Local Government—Public Health—Unsound Meat—Meat being carried in a Cart—"Deposited in any place"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 116.

Unsound meat intended for the food of man was being carried in a cart along a road from a knacker's yard, where it had been partially prepared for sale, to a slaughter-house, where it was to be further prepared for sale. While on its way to the slaughter-house it was seized by an inspector of nuisances under s. 116 of the Public Health Act, 1875 :—

Held, that the meat was deposited in a place for the purpose of preparation for sale within the meaning of that section.

CASE stated by justices for the county of Northampton.

An information was preferred by Francis John Allen, the respondent, against John Williams and John Tyler, the appellants, for that at Rushden the appellant Williams did commit an offence in having in his possession certain meat deposited on and in a certain cart for the purpose of sale or of preparation for sale and intended for the food of man, which meat was unfit for the food of man (1), and that the appellant Tyler aided and abetted the appellant Williams to commit the offence.

The justices convicted the appellants.

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55) :—

Sect. 116 : "Any medical officer of health or inspector of nuisances may at all reasonable times inspect and examine any animal carcase meat . . . . exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged ; and if any such animal carcase meat . . . . appears to such medical officer or inspector to be diseased or unsound or unwholesome or unfit for the food of man, he may seize and carry away the same . . . . in order to have the same dealt with by a justice."

Sect. 117 : "If it appears to the justice that the animal carcase meat . . . . so seized is diseased or unsound or unwholesome or unfit for the food of man, he shall condemn the same, and order it to be destroyed . . . . ; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found shall be liable to a penalty . . . ."

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On the hearing of the information the following facts were admitted or proved :—

(*a*) The appellant Williams was a butcher carrying on wholesale and retail business at Wellingborough and elsewhere. The appellant Tyler was in the employ of Williams as an assistant in his slaughter-house at Wellingborough ; he was the only employee of Williams, who took meat round for sale in carts.

(*b*) The respondent was an inspector of nuisances appointed by the Rushden Urban District Council and authorized to prefer the information on their behalf.

(*c*) On Friday, May 14, 1915, Tyler drove from the premises of Williams a pony and trap to a knacker's yard, the premises of one George Chettle at Newton Road, Rushden, about five miles from Wellingborough, for the purpose of fetching therefrom and conveying to the slaughter-house of Williams the carcase of a cow then lying at the knacker's yard.

(*d*) On arriving at the knacker's yard Tyler took the hide off the carcase ; he then cut the carcase into four quarters and dressed them and also the head in the manner customary for preparing meat for sale in the butchery business. The meat was unfit for the food of man.

(*e*) Tyler then put the four quarters and head together with the liver and the hide into the trap and covered them with wrappers.

(*f*) He then drove the trap with its contents along the road from Rushden to Wellingborough with the object of conveying the meat to Williams's slaughter-house. On his way he was stopped by the respondent, who caused him to drive to a yard of the Rushden Urban District Council.

(*g*) The meat was seized by the respondent while in the trap on the high road at a spot within the parish of Rushden on the way to Wellingborough.

(*h*) The respondent took the steps prescribed by the Public Health Act, 1875, and on May 14 the meat was condemned and destroyed.

(*i*) The meat when put into the trap by Tyler and seized by the respondent was in the possession of Williams.

(*j*) The meat was deposited in a place, to wit, the trap, for the

purpose of preparation for sale, and was unfit for the food of man and was intended by the appellants for the food of man.

The appellants contended that meat being conveyed in a cart along the high road could not in law be regarded as deposited in a place for the purpose of sale or of preparation for sa'e, and that in any event a cart in motion could not be deemed to be a place within the meaning of ss. 116 and 117 of the Public Health Act, 1875.

The respondent contended that the trap was a place within the meaning of the above sections and that there had been a deposit of the meat for the purpose of sale or of preparation for sale.

The justices decided that an offence had been committed, that the meat was deposited in a place for the purpose of sale or of preparation for sale, and that in the circumstances the trap was a place within the meaning of the said sections.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

Barrington-Ward, for the appellants, cited the following cases :— *Young* v. *Grattridge* (1) ; *Daly* v. *Webb* (2) ; *Wie'and* v. *Butler-Hogan* (3) ; *Barlow* v. *Terrett* (4) ; *Bothamley* v. *Jolly*. (5)

B. Campion, for the respondent, was not called on.

RIDLEY J. The question in this case is whether the meat was deposited in a place for the purpose of preparation for sale. It had been fetched by Tyler in a cart from a knacker's yard and was being conveyed along the road that it might be placed in a slaughter-house where it would have been prepared for sale. It was argued that the meat in these circumstances was not deposited because it was not in a condition of permanent deposit. It is true that it was in the cart for the purpose of being carried, but that was in the course of preparation for sale, and for that purpose. In my opinion the words " deposited in a place for the purpose of preparation for sale " are satisfied by these facts. This view is supported by the decision in *Daly* v. *Webb*. (2) There the meat was seized by an inspector of nuisances under the statute 26 & 27 Vict. c. 117, s. 2,

(1) (1868) L. R. 4 Q. B. 166.
(2) (1869) Ir. R. 4 C. L. 309.
(3) (1904) 73 L. J. (K.B.) 513.
(4) [1891] 2 Q. B. 107.
(5) [1915] 3 K. B. 425.

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Ridley J.

while it was being conveyed through the streets of Dublin from a slaughter-house to a manufactory of preserved meat. The words of that statute were the same as in s. 116 of the Public Health Act, 1875. The point was taken that the meat was not "deposited," but Whiteside C.J., delivering the judgment of the Court of Queen's Bench in Ireland, said (1): "We have now to consider whether this meat, which was in Daly's possession, was 'exposed for sale,' or 'deposited for the purposes of sale or of preparation for sale.' We think it was."

In my opinion the decision of the justices was right, and the appeal must be dismissed.

AVORY J. I am of the same opinion. The findings of fact in the case destroy the foundation of the appellants' position. The preparation for sale had commenced. Then the meat was being carried from the knacker's yard to the slaughter-house that further preparation might be made. It was in the course of preparation for sale when it was seized. That only leaves open the contention that because it was in a cart in the road it was not in a place within the meaning of s. 116. It was admitted that while in a cart in the knacker's yard it was deposited in a place. Clearly when the cart reached the slaughter-house the meat would be deposited in a place. None the less is it so when on the road between these two points.

LUSH J. I agree.

Appeal dismissed.

Solicitors for appellants: *Morgan & George, Wellingborough.*

Solicitors for respondent: *Kingsford, Dorman & Co., for Simpson & Mason, Rushden.*

(1) Ir. R. 4 C. L. 315.

W. H. G.

ADMIRAL SHIPPING COMPANY, LIMITED *v.* WEIDNER, HOPKINS & CO.

1915
Dec. 15, 20.

Shipping—Charterparty—Provision for Cessation of Hire—Mutual Exception Clause—Commercial Frustration of Adventure.

Where a charterparty specifies the causes which are to excuse payment of hire of the vessel, no other cause can, in the absence of conduct amounting to withdrawal of the vessel or of her actual loss and apart from any question of commercial frustration, be relied upon by the charterers as a reason for cessation of the hire.

The commercial frustration of an adventure by delay means the happening of some unforeseen delay without the fault of either party to a contract, of such a character that by the delay the fulfilment of the contract in the only way in which it is contemplated and practicable is so inordinately postponed that, when the delay is over, fulfilment will not accomplish the only object or objects which both parties must have known that each of them had in view at the time they made the contract, and for the accomplishment of which it was made.

Quaere whether delay due to a cause contemplated and provided for by a charterparty, even though the delay itself is protracted beyond what might have been expected, ever amounts to commercial frustration of the adventure.

By a time charterparty a British ship was chartered to a firm carrying on business at Newcastle-on-Tyne to be employed in such lawful trades between such safe ports of the United Kingdom and the Continent of Europe and/or Baltic as the charterers or their agents should direct. The hire was payable half-monthly in advance in Glasgow. The charterparty provided that on the happening of certain events (which did not include restraints of princes) the hire was to cease. It contained a mutual exception clause which included "restraints of princes." It also contained a provision that in the event of Great Britain or other European Power being involved in war affecting the working of the steamer at the commencement or during the currency of the charter the charterers were to have the option of cancelling the charter. The vessel proceeded under the charterparty to the Baltic, where she was detained by the Russian naval authorities, and shortly afterwards —war having broken out between Great Britain and Germany—it became impossible for her to continue her voyage, the cause of her detention being treated by the Court as due to "restraint of princes." The charterers had, before the war broke out, sub-chartered the vessel:—

Held, that the charterers continued to be liable for hire, as none of the enumerated reasons for cessation of hire had happened, and

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the adventure had not been commercially frustrated, inasmuch as under the charterparty the charterers could if they pleased have laid up the vessel or have sent her to continental ports instead of to the Baltic.

Held, further, that, as the charterparty expressly provided that in the event of war affecting the working of the steamer the charterers had the option of cancelling the charterparty, cancellation was their only remedy although it might be that in this case the charterers had put it out of their power to exercise that remedy, as to which the Court expressed no opinion.

Quaere whether the doctrine of commercial frustration has any application to a time charterparty, or to the happening of a contingency for which a charterparty makes provision.

AWARD and further award stated by arbitrators in the form of a special case.

By a charterparty (which was headed "Time Charter") dated June 22, 1914, the Admiral Shipping Company, Limited, the owners of the steamship *Auldmuir*, agreed to let and the charterers, Messrs. Weidner, Hopkins & Co., of Newcastle-on-Tyne, agreed to hire the *Auldmuir* for two Baltic rounds commencing from the day she was placed between 6 A.M. and 6 P.M. "with clear holds, and ready for cargo, at the disposal of the charterers, at an East Coast coal port, ... as charterers may direct . . . . not before June 29, 1914, ... she . . . . being maintained by owners with a full complement of officers, seamen, engineers and firemen, necessary for a steamer of her tonnage and class, to be employed in such lawful trades between such safe ports" (except as mentioned in the charterparty) "of the United Kingdom and the Continent of Europe and/or Baltic, ... as charterers or their agents shall direct, ..." By the charterparty it was provided that "the charterers shall pay for the use and hire of the said vessel at the rate of 865*l*. . . . . per calendar month: commencing on and from delivery, as before stated, ... until re-delivery of steamer (unless lost) to owners . . . . at a coal port in the United Kingdom." The payment of hire was to be made half-monthly in advance in Glasgow, and it was further provided that "in the event of loss of time from deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire shall cease until she be again in an efficient state to resume

her services . . . .” The charterparty contained a mutual exception clause which (so far as material) was as follows : “ . . . . arrests and restraints of princes, rulers and people . . . . always mutually excepted.” It also contained the provision “ No goods, contraband of war, to be shipped, and the steamer not to be required to enter any port that is in a state of blockade, or where hostilities are in progress or prospect. No injurious cargoes to be shipped, nor any voyage undertaken nor goods nor cargoes loaded that would involve risk of seizure, capture or penalty by British or foreign rulers or Government. In the event of Great Britain or other European Power being involved in war affecting the working of the steamer at the commencement or during the currency of this charter excluding civil war with [*sic*] Ireland, charterers have the option of cancelling this charter, or to insure at their expense the steamer against all war risks for the full value under the present policy as approved by owners.”

The steamship was delivered to the charterers on June 29, 1914. She left Hull on July 4 for Cronstadt with a cargo of coals.

By a charterparty dated July 9, 1914, and made between the charterers as time chartered owners of said steamship and Messrs. Pyman, Bell & Co., of Newcastle-on-Tyne, as charterers, the steamship was chartered for a voyage from Viborg and Kotka in Finland to, amongst other places, Blyth, Northumberland.

On July 17, 1914, having discharged her cargo of coals at Cronstadt, the steamship left Cronstadt for Viborg and Kotka under the charterparty of July 9, 1914, to load a cargo of wood goods for Blyth. The steamship arrived at Viborg on July 18 and there loaded part of her cargo. She left Viborg on July 25 and arrived at Kotka on July 26 for the purpose of receiving the balance of her cargo.

On July 30, 1914, the agents of the owners by telegram addressed to the steamship at Kotka instructed the captain of the steamship to hurry departure from Kotka. On August 1 the loading of the steamship was completed at Kotka and bills of lading in respect of the cargo were duly signed, and the steamship was that day ready to sail for Blyth. On August 1 the Customs authorities at Kotka refused to allow the steamship to be cleared or to authorize her to leave Kotka. On the same day Germany declared war

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against Russia. Notwithstanding the refusal of the Customs authorities, the captain of the steamship sailed from Kotka on August 1. When the steamship arrived in the neighbourhood of Reval (in the Gulf of Finland) she was stopped by the Russian naval authorities and ordered back to Kotka, where she returned on or about August 2. The hire for the steamship had been paid by the charterers to the owners in advance up to and including August 14, 1914, and no hire had since been paid. On August 14 the agents of the owners by telegram addressed to the steamer at Kotka instructed the captain to remain in port and await further orders, and on August 19 the agents telegraphed to the British Consul at Kotka that the steamship must remain in port. On August 28, 1914, the agents of the owners by telegram instructed the British Consul at Kotka to repatriate the crew of the steamship other than the captain and the chief engineer. The steamship had been detained at Kotka by or in consequence of the action of the Russian naval authorities, and on October 20, the date of the hearing before the arbitrators, the steamship was still so detained.

On behalf of the owners it was contended (inter alia) that the words "restraints of princes, rulers and people" contained in the charterparty of June 22, 1914, did not under the circumstances above mentioned relieve the charterers from the obligation to pay hire, and that they continued liable for the hire of the steamship notwithstanding her detention at Kotka. They further contended that the charterparty contained a clause providing in what events payment of hire was to cease, and "restraints of princes, rulers and people" not being one of those events, the exception of "restraints of princes, rulers and people" contained in the general exceptions clause must be disregarded in connection with the cessation of hire. They also contended that as the steamship was burdened with obligations to third parties by reason of the presence of cargo on board shipped under the charterparty of July 9, 1914, and in respect of which bills of lading had been signed, the charterers were liable for the hire of the steamship. Further that the owners by communicating with the captain did not commit a breach of the charterparty, but that they were justified in so communicating having regard to the circumstances, and that, though the crew with the exception of the captain and chief engineer had been repatriated,

the vessel was still efficient and efficiently manned for the purpose required of her, namely, lying at Kotka.

On behalf of the charterers it was contended that the meaning and intention of the parties to the charterparty of June 22, 1914, must be ascertained at the time the charterparty was entered into; that both parties at that time meant and intended the expression "restraints of princes, rulers and people always mutually excepted" to have relation to the use and hire of the steamship; and that in the event of the use of the steamship being restrained by rulers, princes, or people no hire was due from the charterers during such restraint. They further contended that the owners had committed breaches of the charterparty (*a*) by instructing the captain by the telegram of July 30 to hurry his departure from Kotka; (*b*) in ordering by the telegram of August 14 the captain to remain in port; (*c*) by removing the crew from the steamship; and that under no circumstances could hire be due on and after August 14.

The arbitrators found, subject to the opinion of the Court, "that no time hire is due by the charterers to the owners during the time the vessel has been and is stopped at the port of Kotka under the circumstances aforesaid." The question for the opinion of the Court was whether that finding was right. The matter in that form came before Scrutton J., who remitted the award to the arbitrators to find whether in the circumstances there had been a commercial frustration of the adventure; and by the further award they found that there had been a commercial frustration of the adventure.

Leck, K.C., and *Raeburn*, for the shipowners. The arbitrators' finding that there had been a commercial frustration of the adventure is wrong in law. Frustration of the adventure in order to put an end to the charterparty must be frustration in the view of both parties. But the fact that the *Auldmuir* had loaded a cargo under the charterparty shows that the adventure was not frustrated, though the voyage was interrupted: *Hadley* v. *Clarke* (1), referred to and approved of by Swinfen Eady L.J. in *Beal* v. *Horlock*. (2) In *Jackson* v. *Union Marine Insurance Co.* (3) there was no cargo on

(1) (1799) 8 T. R. 259. (2) [1915] 3 K. B. 627.
(3) (1874) L. R. 10 C. P. 125.

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board. In the present case the charterers had the use of the ship during the whole time of the charterparty. The commercial adventure was not frustrated under the charterparty or sub-charterparty. There was delay during the time the voyage could not be prosecuted, but not a commercial frustration of the adventure: *Brown* v. *Turner, Brightman & Co.* (1) There was no withdrawal of the vessel by the owners.

The true cause of the detention of the vessel was "restraints of princes," which is not one of the causes—which are expressly enumerated—of the cesser. Hire only ceases upon the happening of one of those causes, and the exception of "restraints of princes" does not apply to it: *Hough & Co.* v. *Head* (2), which is in accord with *Aktieselskabet "Lina"* v. *Turnbull & Co.* (3) and *The Santona.* (4)

MacKinnon, K.C., and *R. A. Wright*, for the charterers. The charterparty was a voyage charterparty, the freight being calculated upon the basis of the time consumed in completing the voyage. The ground of the decision in *Brown* v. *Turner, Brightman & Co.* (1) was that the charterers had selected a port where they knew a strike was in progress while they could have selected another port. In the present case the voyage is defined as being out to the Baltic and back. The fact that the cargo was loaded is immaterial. There was a frustration of the objects of the commercial adventure, and that enables the charterers to put an end to the contract: *Embiricos* v. *Reid & Co.* (5) *Brown* v. *Turner, Brightman & Co.* (1) does not go the length of deciding that "restraints of princes" may not cause cessation of hire if it is of such a nature as to result in the commercial frustration of the adventure. The only effect of that decision upon the present case is that the mere fact that "restraints of princes" happened would not of itself cause cessation of hire, as it is not one of the enumerated causes of cessation, although it is in the mutual exception clause. The dissenting judgment of Cleasby B. in *Jackson* v. *Union Marine Insurance Co.* (6) was founded on *Hadley* v. *Clarke* (7), but the other judges in *Jackson* v.

(1) [1912] A. C. 12.
(2) (1885) 54 L. J. (Q.B.) 294.
(3) 1907 S. C. 507.
(4) (1907) 152 Fed. Rep. 516.
(5) [1914] 3 K. B. 45.
(6) L. R. 10 C. P. 125.
(7) 8 T. R. 259.

Union Marine Insurance Co. (1) distinguished *Hadley* v. *Clarke* (2) upon the ground that in that case there was no finding that the object of the voyage was commercially frustrated, and the fact that it was cited in *Beal* v. *Horlock* (3) does not make it resuscitated so as to affect *Jackson* v. *Union Marine Insurance Co.* (1) [*Nickoll & Knight* v. *Ashton, Edridge & Co.* (4) was also referred to.]

Raeburn in reply referred to *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (5) and *Braemount Steamship Co.* v. *Weir & Co.* (6)

Cur. adv. vult.

Dec. 20. The following judgment was read by

BAILHACHE J. This case comes before me on an award of lay arbitrators stated in the form of a special case. The dispute arises under a time charterparty and is whether the charterers are or are not liable to pay the charterparty hire. [The learned judge then stated the facts and continued:] It does not appear from the first award why the arbitrators decided in favour of the charterers, nor did the learned judge express any opinion on that award, or as to what his judgment would be if commercial frustration were found. I have therefore to give my judgment as best I can both on the case as presented in the original award and upon the subsequent finding in the further award of commercial frustration. In order to do this it is necessary to examine with some minuteness the provisions of the charterparty under which the dispute arises. It is upon a time charterparty form, and although it is expressed to be for two Baltic rounds it is in fact a time charterparty, the period not being measured by months, but by the indefinite standard of two Baltic rounds. Under the charterparty the charterers could if they pleased lay the *Auldmuir* up or never send her to the Baltic at all, but employ her in trading between safe ports in the United Kingdom and the Continent of Europe with certain contractual exceptions. [Having read the clauses in the charterparty above set out, and having observed that the only material exception in the mutual exception

(1) L. R. 10 C. P. 125.
(2) 8 T. R. 259.
(3) [1915] 3 K. B. 627.
(4) [1901] 2 K. B. 126.
(5) [1915] 3 K. B. 668.
(6) (1910) 15 Com. Cas. 101.

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clause was that of "restraints of princes," the learned judge continued :] It appears to me that under a charterparty in this form and upon the facts as found in the original award the charterers are liable for hire. The telegrams of the owners referred to in the award did not amount to a withdrawal of the steamship, nor did the repatriation of the crew other than the captain and the chief engineer cause any time to be lost through deficiency of men. The *Auldmuir* has been detained at Kotka, not for want of a crew, but because either of restraint of princes or because she cannot undertake the voyage for which she is sub-chartered without risk of capture, or for both reasons, and inasmuch as the liability for hire is the same whichever is the cause of her detention at Kotka, it is not necessary to distinguish, and for brevity and convenience I will treat her detention there as due to restraint of princes, or, shortly, restraint.

Now restraint is not one of the enumerated reasons for cessation of hire, and I take it to be settled law that, in the absence of conduct amounting to withdrawal of the steamship or of her actual loss and apart from any question of commercial frustration, where a charterparty specifies the causes which are to excuse payment of hire, no other cause can be relied upon by the charterers : see *Hough & Co.* v. *Head* (1), *Braemount Steamship Co.* v. *Weir & Co.* (2), and *Brown* v. *Turner, Brightman & Co.* (3)

It remains to consider the effect of the second award, that the detention of the *Auldmuir* at Kotka has frustrated the commercial object of the venture and that therefore no hire is payable. Frustration is doubtless a question of fact, and the finding of the arbitrators is prima facie binding upon me. I fear, however, that I cannot shift the responsibility of considering the point quite so easily. It may be that the arbitrators have misdirected themselves either from a misunderstanding of what frustration means, or from a misconception of the applicability of the doctrine to the contract in this case. In order to see whether this is so, it is desirable to state what the doctrine of frustration is. The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party to a contract, of such a character as that by it the

(1) 54 L. J. (Q.B.) 294. (2) 15 Com. Cas. 101.
(3) [1912] A. C. 12.

fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made.

Now if this definition is at all accurate, as I trust it is, I doubt whether delay due to a cause contemplated and provided for by the charterparty, even though the delay itself is protracted beyond what might have been expected, ever amounts to frustration of the adventure. If it were so, one would have to hold in this case that restraint of princes does or does not absolve the charterers from payment of hire according to its duration, and this would be to make a new contract for the parties, which the Court must not do, and would be contrary, I think, to the reasoning of the House of Lords in *Brown* v. *Turner, Brightman & Co.* (1) Again, delay, to amount to frustration, must prevent the fulfilment of the only objects for which both parties must have known that each of them entered into the contract. It is easy to see how this applies in a voyage charterparty for the carriage of goods by a named ship from one place to another. The charterer's only object must be to have his goods carried within a reasonable time, and the owner's only object is to earn his freight by this carriage in the like time. Undue delay defeats the charterer's only object and the owner's contract, and the owner's offer to carry the goods at some undefined and distant date is in effect an offer to perform a different contract, and the charterer may refuse it. The extent of the delay which so changes the character of the contract will naturally depend upon the circumstances of each particular case. In a time charterparty the position is quite different. In this case, for example, the charterers might, if they pleased, have laid up the *Auldmuir*, and if it is said that that is unlikely, they might have sent her to continental ports, in neither of which cases would any difficulty have arisen. There was in fact no object in common contemplation between the parties except that the charterers should have the services of the steamship for some legitimate purpose within the terms of the charterparty. Those services they have: if in a

(1) [1912] A. C. 12.

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restricted and unremunerative way, the reason is that unfortunately they sent her to the Baltic instead of to the Mediterranean as they might have done. The owners are in truth giving the charterers all that they contracted to give, namely, such services of the *Auldmuir* as she was capable of rendering, subject to the excepted peril of restraint of princes. It seems to me impossible to apply the doctrine of frustration to a case where one of the parties to the contract is fulfilling his part of the contract according to its terms. Once more—in this case the charterparty makes provision for war affecting the working of the steamer at the commencement or during the currency of the charterparty. This is precisely what has happened in this case, and where the contract makes provision for a given contingency it is not for the Court to import into the contract some other and different provision for the same contingency called by a different name. The provision in this charterparty is an option to the charterers to cancel, and this must remain their only remedy. If this option is not open to them it is because the *Auldmuir* is lying at Kotka under sub-charter from the charterers with a cargo on board. I express no opinion as to whether these facts prevent the exercise of the charterers' option to cancel, but if they do the fact that the charterers have put it out of their power to exercise the option does not entitle them to claim some other remedy which the contract does not give them, and it certainly makes it difficult for the charterers to say that they are not in fact receiving the services of the steamship. I observe with some interest that the unknown arbitrator whose award came before Bray J. in *Braemount Steamship Co.* v. *Weir & Co.* (1) was of opinion that the doctrine of frustration could have no application to a time charterparty. I think he was probably right, and is supported by the House of Lords' decision in *Brown* v. *Turner, Brightman & Co.* (2), but it is sufficient for me to say that it cannot be successfully invoked under the circumstances of this case and under this charterparty. I think the arbitrators have misapprehended or misapplied the legal doctrine of frustration by delay, and that I ought to disregard their finding in their second award, and I hold that the charterers are liable for the hire.

Before I part with this case, and to prevent any misconception in

(1) 15 Com. Cas. 101. (2) [1912] A. C. 12.

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the unlikely event of this judgment being referred to on any subsequent occasion, I desire to point out that nothing I have said has any application to or bearing upon a case in which the chartered vessel is either lost actually or taken out of the possession and control of the owners by one of the excepted perils so that the owners are unable to give the charterers the use of their vessel for any purpose whatever. The result is that the award will be set aside.

Award set aside.

Solicitors for shipowners: *Botterell & Roche, for Botterell, Roche & Temperley, Newcastle-on-Tyne.*

Solicitors for charterers: *T. Cooper & Co., for Dixon Jacks, Newcastle-on-Tyne.*

J. E. A.

CAPEL *v.* SOULIDI.

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Oct. 26.

Charterparty—Construction of—"Commandeer."

A ship or other thing is said to be "commandeered" when the Government of the owner's country require it to be placed at their disposal so that they may use it for military purposes if they should want it, whether they in the result ever so use it or not.

The owner of a Greek ship chartered her to the plaintiffs under a charterparty which provided that if she should be "commandeered" by the Greek Government the charterparty should be cancelled. While the ship was lying at Marseilles the Greek Government sent an order to the captain requiring him to proceed at once to Piræus for the purpose of placing the ship at their disposal if they should require to use it. Before the ship had left Marseilles the Greek Government withdrew their order and released the ship:—

Held, that the ship had been commandeered and that the charterparty was cancelled.

TRIAL of action before Atkin J.

By a charterparty dated May 6, 1915, the defendant, the owner of the Greek steamer *Kardamila*, chartered her for twelve months to the plaintiffs, who are coal merchants at Cardiff, to carry certain cargoes within the limits of the west coast of the United Kingdom, France not east of Calais, Portugal, Spain, and the Mediterranean not east of Sicily. The charterparty contained the following clause: "Should steamer be commandeered by the Greek Government

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this charter shall be cancelled." The ship was employed by the plaintiffs to carry coal from South Wales to Marseilles, and on September 25, 1915, she was in Marseilles Harbour discharging coal. Upon that day a notice in Greek was served upon the captain by the Greek Consul-General at Marseilles, of which the following is a translation:—"I beg to advise you that pursuant to the telegraphic orders of the Royal Greek Government all Greek steamers in the harbour of Marseilles in ballast or loaded with coal or grain must proceed immediately to Piræus, and the steamers loaded with other cargoes to discharge with all speed and sail immediately for Piræus. In informing you of the above order of the Royal Greek Government I beg you to strictly and without fail conform to same and acknowledge receipt."—Signed by the Consul-General. On September 27 the defendant wrote to the plaintiffs: "I hereby beg to formally notify you that the s.s. *Kardamila* having been commandeered by the Greek Government the charterparty of the 6th May last is cancelled pursuant to clause 32. Your's &c. D. Soulidi." The defendant was desirous that the ship, which had some time before suffered damage from a collision, should be thoroughly repaired before proceeding to Piræus, for fear that if she went there unrepaired she might lose her class. He accordingly entered into negotiations with the Greek Government through the Consul-General with the object of getting permission to have the ship repaired. Eventually on October 11, while the ship was still lying at Marseilles, the Greek Government withdrew their order contained in the notice of September 25 and released the ship, which, having already discharged her cargo, then proceeded to Cardiff. In the meantime freights had risen considerably above the rate reserved in the charterparty, and the defendant contended that the ship had been "commandeered" within the meaning of the policy, and that he was consequently entitled to charter her afresh at the higher rate. The plaintiffs brought this action claiming a declaration that the charterparty remained valid and binding on the defendant, and claimed an injunction to restrain him from employing the ship otherwise than in accordance with the terms of the charterparty.

MacKinnon, K.C., and *Raeburn*, for the plaintiffs. The ship was not commandeered. That term is defined in the Oxford English

Dictionary to mean "to command or force into military use; to seize for military use." Here the Greek Government never seized or exercised any control over the ship for military purposes. At the most they took a step which was preliminary to a possible future commandeering.

Roche, K.C., and *C. R. Dunlop*, for the defendant. The order to proceed to Piræus amounted to a commandeering. If so, it is immaterial that the Greek Government never in fact used the ship for military purposes: *Adamson* v. *Newcastle Steamship Freight Insurance Association*. (1)

MacKinnon, K.C., in reply.

ATKIN J. The question which I have to decide is whether this charterparty is cancelled, and that depends upon whether the ship was or was not "commandeered." As to the meaning of that term I have to form the best conclusion that I can. It is a word, as I understand, of recent origin in ordinary use, and a word as to which there has been no previous judicial interpretation to guide me. In my opinion that expression means that the particular Government seize, or require the owner to surrender control of, the subject-matter for their own military purposes, and not for general political purposes or for the protection of the ship. I do not think that if a Government were to give orders to a ship to deviate or to take refuge at a friendly port, war being imminent, that would be a commandeering of the ship. I think that it involves the Government having in prospect, at any rate, the taking of the ship for military purposes; and that, according to the best conclusion that I can form, is what happened here. It was argued that the order of the Greek Government was merely a general order to all ships to proceed home for general political purposes, and had the same effect as an embargo would have had if the ships had been actually in Greek ports. It was said that it was only a preliminary step in the direction of commandeering, and did not amount to a commandeering itself. I do not think that that is a correct view of the facts. To my mind the proper inference to draw is that the Government required Greek ships to return to Greece to enable the Government to use those ships on arrival for military purposes if they thought fit,

(1) (1879) 4 Q. B. D. 462.

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though it does not necessarily follow from the order that the Government would avail themselves of the ships when they arrived. Moreover, I had evidence before me to the effect that as soon as the order was given the crew of the ship were by Greek law deemed to be members of the Royal navy, and as such I presume would be subject to naval discipline. I think that that also indicates that the Government assumed control of the ship from the time that they gave the order, so as to make the ship, at any rate until it arrived in Greece, their ship. They would no doubt be able to decide when it arrived whether they had any use for it. It was further argued that the order of the Government was substantially inoperative because, in fact, it did not prevent the ship from performing its obligations under the charterparty, as she remained during the whole of the interval between September 25, when the notice was given, and October 11, when it was withdrawn, at Marseilles, and eventually sailed back from that port to Cardiff, where she would naturally have gone under the charterparty. But that seems to me to have no real bearing on the construction of the clause. The clause says that if the ship is commandeered the charterparty shall be cancelled. I think that, upon the true construction of that clause, immediately upon the occurrence of the event of commandeering the charterparty was ipso facto cancelled. That is the effect of the decision in *Adamson* v. *Newcastle Steamship Freight Insurance Association.* (1) What happened afterwards is immaterial. But even if the true construction were that upon the happening of that event the owner had an option to cancel, it is clear from the letter of September 27 he did exercise that option here. I am satisfied that the ship was commandeered by the Greek Government and that the charterparty was consequently cancelled.

Judgment for defendant.

Solicitors for plaintiffs: *Stokes & Stokes.*

Solicitors for defendant: *Downing, Handcock, Middleton & Lewis.*

(1) 4 Q. B. D. 462.

J. F. C.

Applied. R. *v.* THOMAS. [1949] 2 All E.R. 662.

[COURT OF CRIMINAL APPEAL.]

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Nov. 29,

THE KING *v.* TONKS.

Criminal Law—Summary Conviction for neglecting Child in Manner likely to cause Unnecessary Suffering or Injury to Health—Subsequent Death of Child—Indictment for Manslaughter—Plea of Autrefois convict—Question raised at Trial but no formal Plea—Power of Court of Criminal Appeal to entertain Appeal—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 3 (*a*), (*b*)—*Children Act*, 1908 (8 *Edw.* 7, *c.* 67), *s.* 12, *sub-ss.* 1 (*b*), 3, 4.

By s. 3 of the Criminal Appeal Act, 1907, "A person convicted on indictment may appeal . . . . to the Court of Criminal Appeal—(*a*) against his conviction on any ground of appeal which involves a question of law alone; and (*b*) with the leave of the Court of Criminal Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground . . . . which involves . . . . a question of mixed law and fact, or any other ground which appears to the Court to be a sufficient ground of appeal . . . ."

At the trial for manslaughter of a prisoner who was undefended a discussion took place between the judge and counsel for the prosecution as to whether a plea of autrefois convict could be established. The judge came to the conclusion that the plea could not be established and proceeded with the trial. The jury convicted the prisoner. The judge gave leave to appeal, but no certificate was drawn up. The prisoner having appealed:—

Held, that the mere technicality that there had been no formal plea of autrefois convict and no certificate drawn up did not prevent the Court of Criminal Appeal from doing what was right, and that the prisoner was therefore entitled to appeal as if there had been a plea of autrefois convict and the judge had held that there was no case to go to the jury upon the plea.

Rex v. *Clark* (1820) 1 Brod. & B. 473 is not an authority for the test as to the sufficiency of a plea of autrefois convict laid down in Archbold's Criminal Pleading, 24th ed., at p. 177.

Illustration in Stephen's Digest of Criminal Procedure (1883 ed.), p. 174, of proof of plea of autrefois convict or acquit upon an indictment for murder by proving former conviction for concealment of birth not assented to.

By s. 12, sub-s. 4, of the Children Act, 1908, "upon the trial of any person . . . . for the manslaughter of a child . . . . of whom he had the custody . . . . it shall be lawful for the jury, if they are satisfied that the accused is guilty of" one of the lesser offences

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mentioned in the section, "to find the accused guilty of such offence":—

Held, that the sub-section does not mean that the jury can convict the prisoner of one of the lesser offences mentioned in the section although they think that he is guilty of manslaughter; it means that they are at liberty to convict the prisoner of the lesser offence if that is what they think their true verdict ought to be upon the facts, notwithstanding that he is charged with manslaughter.

APPEAL by the prisoner Annie Tonks against her conviction for manslaughter.

On September 27, 1915, the prisoner and her husband were convicted summarily before the Walsall borough justices, under s. 12 of the Children Act, 1908, of unlawfully and wilfully neglecting their children, including James Tonks, aged six years, in a manner likely to cause them unnecessary suffering or injury to their health, and were sentenced to terms of four and three months' imprisonment with hard labour respectively. The child James died at the Walsall Workhouse Infirmary on October 1. A coroner's jury returned a verdict of manslaughter against the prisoner and her husband. They were thereupon brought before the Walsall justices under a Home Office order and committed for trial for manslaughter at the Stafford Assizes.

The trial took place on November 9, 1915, before Bailhache J. Neither the prisoner nor her husband was defended, but in the course of the opening speech the learned judge had his attention called by counsel for the prosecution to the possibility of a plea of autrefois convict being an answer to the charge of manslaughter. That view was based on the well-established rule of common law that a person ought not to be put in peril twice for the same offence. Before evidence was called the learned judge asked counsel for the prosecution whether it were not possible that as a matter of law the prisoners could not be convicted of manslaughter notwithstanding the fact that the death of the child had occurred since the first trial and conviction, the suggestion being that the death might possibly be held to be only an aggravated consequence of the wilful neglect, and that they could not be again put upon their trial for that neglect, having already been tried and convicted for that offence. On being referred to the case of *Reg.* v.

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Friel (1) the judge decided to proceed with the trial and to give leave to appeal in the event of the verdict being adverse to the prisoner or her husband. There was no formal plea of autrefois convict, nor was the verdict of the jury given on the plea. The jury found the prisoner guilty of manslaughter, but her husband was acquitted. Evidence was given that the child was tuberculous and that its death was accelerated by the gross neglect of the prisoner. The prisoner was sentenced to five months' imprisonment with hard labour in addition to her sentence for the first offence.

Bailhache J. gave the prisoner leave to appeal, but no certificate was drawn up.

The prisoner appealed upon the ground that she had already been " tried and convicted of neglecting the child of whose killing " she " was convicted at the assizes."

F. W. Sherwood, for the appellant. The appellant could have pleaded autrefois convict at the trial for manslaughter. Between September 27, 1915, the date of her summary conviction, and November 9, 1915, the date of her conviction at the assizes, the appellant did nothing and omitted nothing with reference to the child. Therefore all the circumstances had arisen at the date of her summary conviction with the exception of the death of the child. There was only one set of circumstances, and the conviction at the assizes was in violation of the maxim " Nemo debet bis vexari, si constat curiae quod sit pro una et eadem causa." The effect of the discussion as to the plea of autrefois convict was to let the jury know that the appellant had been previously convicted. Although there was no plea of autrefois convict, this Court has full power to deal with the matter under clauses (*a*) and (*b*) of s. 3 of the Criminal Appeal Act, 1907. (2)

(1) (1890) 17 Cox, C. C. 325.

(2) Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 3 : " A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal—

. . . . . .

" (*b*) with the leave of the Court of Criminal Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves . . . . a question of mixed law and fact, or any other ground which appears to the Court to be a sufficient ground of appeal."

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[LORD READING C.J. We think that the point is open to you.]

The appellant could have been convicted of the same offence upon both trials and therefore the rule nemo debet bis vexari applies. Under s. 12, sub-s. 4, of the Children Act, 1908 (1), juries are no longer bound by the rigour of the old law, and are at liberty at any trial upon an indictment for manslaughter of a child to find a verdict of neglecting the child. The appellant has therefore been twice in peril for the same offence, i.e., for neglecting the child in a manner likely to cause it unnecessary suffering or injury to its health. The jury could lawfully have found a verdict that the appellant was guilty of neglect if they were convinced that that was what their true verdict ought to be even though upon the facts as proved they were in law justified in returning the verdict of manslaughter, and the judge ought to have directed them that they could find a verdict for the lesser offence.

[LORD READING C.J. The words "it shall be lawful" in s. 12, sub-s. 4, of the Children Act, 1908, make it plain that all that the Legislature intended was that if the jury do not think that the charge of manslaughter is proved they can find a verdict for the lesser offence.]

Even if that be the true proposition, the appellant was still in

(1) Children Act, 1908 (8 Edw. 7, c. 67), s. 12, sub-s. 1: "If any person over the age of sixteen years, who has the custody, charge, or care of any child . . . . wilfully . . . . neglects . . . . such child . . . . in a manner likely to cause such child . . . . unnecessary suffering or injury to his health . . . . that person shall be guilty of a misdemeanor, and shall be liable—

. . . . . .

"(*b*) on summary conviction, to a fine . . . . or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding six months; . . . ."

Sub-s. 3: "A person may be convicted of an offence under this section, either on indictment or by a Court of summary jurisdiction, notwithstanding the death of the child . . . . in respect of whom the offence is committed."

Sub-s. 4: "Upon the trial of any person over the age of sixteen indicted for the manslaughter of a child . . . . of whom he had the custody charge or care, it shall be lawful for the jury, if they are satisfied that the accused is guilty of an offence under this section in respect of such child . . . . to find the accused guilty of such offence."

peril of being twice convicted for the same offence of neglecting the child: *Chalker's Case.* (1) The greater charge included the lesser. In Stephen's Digest of Criminal Procedure (1883 ed.), p. 174, it is stated that "in order to prove a plea of autrefois convict, the defendant must show that he was previously convicted, either of the offence charged in the indictment to which the plea is pleaded, or of an offence of which he might be convicted on that indictment . . . . "; and amongst the illustrations of proof of the plea is the following: "A. pleads autrefois convict or acquit to an indictment for the murder of B., and proves a previous conviction or acquittal for the manslaughter of B., or for the concealment of the birth of B. The plea is proved."

It is true that the decision in *Reg.* v. *Morris* (2) appears to be an authority against the appellant, but s. 12, sub-s. 4, of the Children Act, 1908, was not passed until after that decision and others which are the same in principle.

[AVORY J. The true question in this case is whether the appellant was on the first trial in peril of being convicted of the same crime as that for which she was in peril of being convicted in the second proceedings. If she was in such peril a plea of autrefois convict in respect of that crime would be proved. In addition to *Reg.* v. *Morris* (2), *Reg.* v. *Friel* (3) appears to be conclusively against the appellant.]

In Archbold's Criminal Pleading, 24th ed., at p. 177, it is laid down that "The true test by which the question, whether such a plea is a sufficient bar in any particular case, may be tried is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first: *Rex* v. *Clark* (4)." If that passage can be supported the appellant is entitled to succeed.

[LORD READING C.J. No judgment was delivered in that case.]

The proposition agrees with the illustration given in Stephen's Digest of Criminal Procedure, and the view of the law so expressed ought to be upheld as being in confirmation of the principle that no one ought to be put in peril twice for the same matter. [*Norton's*

(1) (1910) 4 Cr. App. R. 2.
(2) (1867) L. R. 1 C. C. R. 90.
(3) 17 Cox, C. C. 325.
(4) 1 Brod. & B. 473.

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Case (1), *Reg.* v. *Miles* (2), *Rex* v. *Barron* (3), and *Rex* v. *Vandercomb* (4) were also referred to.]

D. Cotes-Preedy, for the prosecution, was not called upon.

The judgment of the COURT (Lord Reading C.J., Lord Coleridge and Avory JJ.) was delivered by

LORD READING C.J., who, having stated the facts, continued: At the trial the learned judge came to the conclusion that on the charge of manslaughter the conviction for wilful neglect would not establish a plea of autrefois convict, but thought the point was worth the consideration of this Court. On behalf of the appellant it has been contended before us that we must regard this case as if a plea of autrefois convict had been properly entered and the judge had ruled as a matter of law that there was no case to go to the jury upon the point. We think that that view is right, and that, if a plea of autrefois convict can be supported, no technicality would prevent this Court from doing what is right. The Criminal Appeal Act, 1907, is clear upon that point.

On the main issue raised by this appeal our attention has been drawn on behalf of the appellant to the provision contained in s. 12, sub-s. 4, of the Children Act, 1908, by virtue of which it is open to the jury, at the trial of a person over sixteen years of age for the manslaughter of a child of whom that person has the custody, charge, or care, to find the accused guilty of the minor offence of wilful neglect, or of some other offence under the section, notwithstanding that they do not find him guilty of manslaughter—that is to say, that if the person is charged with manslaughter the jury are, under the statute, not bound to return a verdict of guilty of manslaughter or acquittal, but it is open to them, under the statute, to find the accused guilty of wilful neglect notwithstanding that the prisoner is indicted for manslaughter.

On behalf of the appellant it has been contended by Mr. Sherwood that the section must be read as meaning that the jury can find a verdict that the prisoner is guilty of the lesser offence of wilful neglect notwithstanding that they come to the conclusion on the facts that the accused has been guilty of manslaughter. We cannot

(1) (1910) 5 Cr. App. R. 65.
(2) (1890) 24 Q. B. D. 423.
(3) [1914] 2 K. B. 570.
(4) (1796) 2 Leach, 708.

think that that is the meaning of the section or that it would be giving a natural or reasonable interpretation to its language. In our view the section was passed simply to enable a jury before whom a prisoner is being tried for the manslaughter of a child to find a verdict of a lesser offence, e.g., wilful neglect, if they think that the facts warrant a conviction for that offence, or, in other words, if they think that that is what their true verdict ought to be, notwithstanding that the crime for which the prisoner stands indicted is that of manslaughter. Without the section, if the jury thought that there had been wilful neglect but the death of the child had not been caused or accelerated by it, they would have been bound to acquit the prisoner. But by virtue of the section, if the prisoner is charged with manslaughter, but the jury think that there has been wilful neglect but that the death did not result from it, they may find a verdict to that effect.

Reference was also made by Mr. Sherwood to sub-s. 3 of s. 12, but that sub-section does not enable us to arrive at the interpretation of sub-s. 4 for which he contends. Sub-s. 3 means that, notwithstanding the death of the child in respect of whom the offence is alleged to have been committed, a person may be charged with an offence under s. 12, for instance, that of wilful neglect—in other words, that a person guilty of wilful neglect may be charged with that offence notwithstanding the death of the child. There is therefore no difficulty arising under the Children Act, 1908, in applying the well-known principle to which our attention has been called. We have come to the conclusion that s. 12, sub-s. 4, has not the effect for which Mr. Sherwood contended on behalf of the appellant.

On behalf of the appellant it was also urged that on the second trial she was charged with the offence for which she had already been convicted, because the greater charge includes the less. But that contention ignores the most important fact of the subsequent death of the child, which occurred some days after her first conviction. At the date of the first trial for the offence of wilful neglect, whether it had taken place under the Summary Jurisdiction Acts or on indictment, it would have been impossible to charge her with manslaughter because the death had not then occurred. When the death occurs after the conviction for the lesser offence and an indictment for manslaughter is preferred, no difficulty arises, because

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proper effect can be given to s. 12, sub-s. 4, by the judge telling the jury that they must, having regard to the special facts of the case, either come to the conclusion that the accused is guilty of manslaughter or return a verdict of acquittal. The judge could not, as he could in a normal case under the section where there had been no previous conviction for wilful neglect of the child, point out to the jury that it is open to them if they think fit to find the prisoner guilty only of the lesser offence on the indictment for the greater one. In our view it is wrong to say that a person indicted for the manslaughter of a child whose death has occurred after the conviction of the same person for the wilful neglect of that child is twice put upon his or her trial for the same offence.

During the course of the argument our attention was drawn to various authorities. They have been discussed in this Court in several cases, and their underlying principle is so plain as to be beyond controversy. It is not necessary, therefore, to deal with them now. But we desire to call attention to a passage in Archbold's Criminal Pleading, 24th ed., p. 177, which is in the following terms : " The true test by which the question, whether such a plea is a sufficient bar in any particular case, may be tried is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first." The authority cited in support of that proposition is *Rex* v. *Clark*. (1) But on examination it will be found that that case is not an authority in support of the principle enunciated in the text-book. That book, which is usually entirely accurate and is evidence of so much painstaking skill and industry, is wrong in citing *Rex* v. *Clark* (1) as establishing the principle there stated. What happened in that case was that there had been an indictment of the prisoner for causing the death of a child by pouring oil of vitriol down its throat and forcing the child to swallow it. The prisoner having been acquitted upon that charge, an indictment was preferred against her of causing the death of the child by administering oil of vitriol and forcing the child to take it into its mouth and throat whereby the mouth and throat became disordered and the child died, the difference being that in the first indictment the prisoner was alleged by the pouring of the oil of vitriol into the child's

(1) 1 Brod & B. 473.

throat to have compelled the child to swallow it down whereby the child died, and in the second indictment, instead of the allegation that she compelled the child to swallow it, she was alleged to have compelled the child to take it into its mouth and throat whereby the mouth and throat became disordered and the child died. The two indictments therefore alleged that the same cause brought about the death of the child and the plea of autrefois acquit was upheld. That is a totally different principle from that stated at p. 177 of Archbold's Criminal Pleading. All that is said in *Rex* v. *Clark* (1) is that the prisoner's plea was allowed but that no judgment was ever delivered.

We were also referred to a passage on p. 174 of Stephen's Digest of Criminal Procedure (1883 ed.), where it is said that "A. pleads autrefois convict or acquit to an indictment for the murder of B., and proves a previous conviction or acquittal for the manslaughter of B., or for the concealment of the birth of B. The plea is proved." It must not be taken that we assent to that illustration in regard to the concealment of birth.

In our view, therefore, the whole point in this case turns upon the interpretation of s. 12, sub-s. 4, of the Children Act, 1908, and it follows from the view we take of that sub-section that this appeal fails and must be dismissed.

Appeal dismissed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*
Solicitor for prosecution: *Director of Public Prosecutions.*

(1) 1 Brod. & B. 473.

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Dec. 1, 2.

LORD ASHBURTON *v.* GRAY.

Arbitration—Agricultural Holdings Act, 1908—*Costs—Discretion of Arbitrator.*

In an arbitration under the Agricultural Holdings Act, 1908, the arbitrator may in his discretion direct the successful party to pay the costs of the arbitration.

APPEAL from the Winchester County Court.

The defendant was the tenant of a farm under a lease which expired at Michaelmas, 1913. The plaintiff, who was the landlord, claimed from the defendant the sum of 744*l.* on account of alleged dilapidations. The lease contained an arbitration clause, and the matter was referred to arbitration under the Agricultural Holdings Act, 1908. The defendant contended that he was not liable under the lease to pay compensation for dilapidations, and the arbitrator stated a special case for the opinion of the Court upon that question. The Court of Appeal expressed the opinion that the defendant was liable to pay for dilapidations, and ordered that the matter of the arbitration should be remitted to the arbitrator to proceed with the same and deal with the matter of all costs, including the costs of the appeal. The matter was fully heard by the arbitrator, who came to the conclusion, after carefully considering the evidence, that the plaintiff was entitled to 71*l.* only. With regard to the costs, the arbitrator, in an affidavit, stated that he carefully considered the opinion of the Court of Appeal and the discretionary powers conferred on him by the Agricultural Holdings Act, 1908 (1), and,

(1) 8 Edw. 7, c. 28 :—

Sect. 13 : "(1.) All questions which under this Act or under the contract of tenancy are referred to arbitration shall, whether the matter to which the arbitration relates arose before or after the passing of this Act, be determined, notwithstanding any agreement under the contract of tenancy or otherwise providing for a different method of arbitration, by a single arbitrator in accordance with the provisions set out in the Second Schedule to this Act."

"(4.) The Arbitration Act, 1889, shall not apply to any arbitration under this Act."

Second Schedule, r. 13 : "When an arbitrator has misconducted himself, or an arbitration or award has been improperly procured, the county court may set the award aside."

after taking into account and carefully considering the reasonableness or unreasonableness of the claim, the conduct of the parties, and generally all the circumstances of the case, came to the conclusion that it was only fair and equitable that each of the parties should pay his own costs of and incidental to the special case and of the proceedings in and orders of the county court and of the Court of Appeal, and that the remainder of the costs of the arbitration should be borne by the plaintiff. The arbitrator made his award accordingly.

The plaintiff applied to the county court judge to set aside the award of the arbitrator upon the ground that he had misconducted himself in making the above award as to costs. The county court judge refused the application, and the plaintiff appealed.

Disturnal, K.C., and *W. Allen*, for the appellant. The arbitrator has been guilty of legal misconduct in awarding that the successful party shall pay the costs of the arbitration; and the award is bad upon the face of it. The utmost that an arbitrator can do is to award that the successful party shall bear his own costs for some good cause. The arbitrator cannot have a wider power to award costs than a judge of the High Court, who can only order a successful party to pay costs in very exceptional cases or deprive him of costs for good cause. The arbitrator acted in a manner contrary to legal principles and was therefore guilty of legal misconduct. The procedure and practice in an arbitration under the Agricultural Holdings Act, 1908, are governed by s. 3 of the Act and rr. 13 and 14 in the Second Schedule, and there is no provision giving

Rule 14: "The costs of and incidental to the arbitration and award shall be in the discretion of the arbitrator, who may direct to and by whom and in what manner these costs or any part thereof are to be paid, and the costs shall be subject to taxation by the registrar of the county court on the application of either party, but that taxation shall be subject to review by the judge of the county court."

Rule 15: "The arbitrator shall, in awarding costs, take into consideration the reasonableness or unreasonableness of the claim of either party, either in respect of amount or otherwise, and any unreasonable demand for particulars or refusal to supply particulars, and generally all the circumstances of the case, and may disallow the costs of any witness whom he considers to have been called unnecessarily, and any other costs which he considers to have been incurred unnecessarily."

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the arbitrator absolute discretion as to costs or the power to order a successful party to pay the costs. These provisions of this Act are in substance to the same effect as the provisions with regard to costs in the Arbitration Act, 1889, and in s. 5 of the Judicature Act, 1890, under which the arbitrator or the Court or judge must exercise the discretion as to costs judicially. Sect. 5 of the Judicature Act, 1890, was passed to remedy the omission in the Act of 1875 and to give power to order payment of costs where there was previously no such power: *In re Fisher* (1); but it did not otherwise alter the previous law relating to costs, which is very fully dealt with in *Foster* v. *Great Western Ry. Co.* (2) In *Harris* v. *Petherick* (3), where it was decided that in some cases a successful party can be ordered to pay the costs, Cotton L.J. said that he did not think that under the old practice in Chancery a successful plaintiff was ever ordered to pay costs. The discretion must be judicially exercised, and a party who has successfully asserted his legal right and has not misconducted himself is entitled to his costs—*Cooper* v. *Whittingham* (4)—and certainly cannot be ordered to pay costs: *Evans* v. *Gwauncaegurwen Co.* (5); *Kierson* v. *Thompson.* (6) The last two cases were under the Workmen's Compensation Act, 1906, and it was held that if an arbitrator under that Act has a discretion it must be judicially exercised. *In re Fearon and Flinn* (7), in which it seems to have been held that the arbitrator can in his discretion award that a successful party shall pay the costs, is distinguishable, because at that time the only power of an arbitrator to deal with costs was under the agreement to refer; the Court, therefore, in that case was dealing only with the particular agreement before it, and the decision has no bearing upon a statutory arbitration. In the present case there was no good cause for which a judge of the High Court could have deprived the plaintiff of costs, and the arbitrator cannot have a larger discretion.

The arbitrator has been guilty of legal misconduct in exercising his discretion so as to produce a miscarriage of justice: *Williams* v. *Wallis.* (8)

(1) [1894] 1 Ch. 450.
(2) (1882) 8 Q. B. D. 515.
(3) (1879) 4 Q. B. D. 611, 614.
(4) (1880) 15 Ch. D. 501.
(5) (1912) 106 L. T. 613.
(6) [1913] 1 K. B. 587.
(7) (1869) L. R. 5 C. P. 34.
(8) [1914] 2 K. B. 478.

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Clavell Salter, K.C., and *S. H. Emanuel*, for the respondent. The provisions of the Agricultural Holdings Act give the widest discretion to the arbitrator with regard to costs by r. 14 of the Second Schedule, which says that the costs "shall be in the discretion of the arbitrator"; and this is shown by the provisions of r. 15, which expressly direct him to take into account certain matters in awarding costs. In the present case the arbitrator was justified in saying that the claim was unreasonable and, taking that into account, in exercising his discretion by ordering the plaintiff to pay these costs. The arbitrator has complete discretion and has exercised it upon grounds specified by the Act. The arbitrator, apart from express agreement or statutory provision to the contrary, has an absolute discretion as to costs: *In re Fearon and Flinn* (1); *Evans* v. *Gwauncaegurwen Co.* (2) When the parties have chosen their own tribunal, as in the present case, they submit to the discretion of that tribunal; and the case is different from that of a statutory Court or tribunal, and the rules applicable to the discretion of a judge do not apply. In the former case the discretion is absolute and is not a judicial discretion. The arbitrator under the Workmen's Compensation Act is the judge and is therefore bound by the rules applicable to a judge, and the arbitration is made compulsory by the statute. Here the arbitration was in consequence of the agreement of the parties to arbitrate, and the case of *In re Fearon and Flinn* (1) is an express authority that the arbitrator in his discretion can make this order and the Court cannot interfere.

W. Allen in reply. There is no distinction between cases under the Workmen's Compensation Act and under this Act. Under the former Act the judge, by the express words of the statute, acts as an arbitrator. Therefore the discretion in the one case is the same as in the other, and decisions on the former Act are applicable to cases under this Act.

RIDLEY J. In this case a very difficult point arises which one would have thought had already been decided, but there is no decision that exactly governs the question. These proceedings were under the Agricultural Holdings Act, 1908. The landlord

(1) L. R. 5 C. P. 34. (2) 106 L. T. 613.

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claimed for dilapidations a sum of over 700*l.* The tenant had the usual claim for allowances to put before the arbitrator, but this was settled, and there remained nothing but the claim for dilapidations by the landlord, as to which, as far as we know, the tenant had not made any offer. There was a question to be determined before the amount due to the landlord for dilapidations, or whether there was any amount due at all, could be settled, which arose under a clause in the lease. That point went to the Court of Appeal. In the result, it having been left by the order of the Court of Appeal to be decided by the arbitrator, he found that 71*l.* was due to the landlord, and no more, and he accompanied that finding with a direction about the costs which appears in his affidavit as follows: [The learned judge read the statement set out above.] Therefore the question arises whether a successful claimant can be ordered to pay the costs of the other side. It seems to me that this claimant was successful. I do not think that if a person who has a claim puts forward an exaggerated claim and gets so infinitesimal a sum as 5*s.* one could say he was successful; but I think if a man puts forward a claim for 700*l.* and it is found that he is entitled to 71*l.* he has a right to say that he was a successful claimant or litigant. Therefore I think that if he had been a successful litigant in a Court of law and had recovered that sum of money, then this exercise of discretion as to costs would have been liable to be questioned as in the cases which have been cited before us. Perhaps the case which is the readiest for the purpose is *Cooper* v. *Whittingham* (1), where Jessel M.R. said this: "As I understand the law as to costs it is this, that where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion, and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts: for instance there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs; but where there is nothing of the kind the rule is plain and well settled, and is as I have stated it. It is, for instance, no answer where a plaintiff asserts a legal right for a defendant to

(1) 15 Ch. D. 501, 504.

allege his ignorance of such right, and to say, 'If I had known of your right I should not have infringed it.'" The plaintiff or claimant here was not proceeding for the enforcement of a legal right, except in this sense, that he had a legal right to recover the 71*l.* It has not been, as far as I can see, alleged that he has been guilty of any misconduct at all except in so far as a man who claims more than he ultimately recovers can be said to be guilty of misconduct, which I conceive not to have been intended by the Master of the Rolls. The same principle, I think, will be found in the other cases cited, that where a person is a successful claimant he is not to be deprived of his costs except for misconduct nor ordered to pay the costs of the other side; in other words, the discretion of the Court, which means the High Court of Justice and the judges thereof, is fettered by the rule that if they have a discretion they must exercise it judicially, that is to say subject to the rules which the Court has laid down for the exercise of that discretion. This, however, is the case of an arbitrator under the Agricultural Holdings Act, and the question is whether the discretion of that arbitrator is fettered like the judicial discretion of a Court or judge. There is no decision, I think, upon the subject. I do not see any distinction between Order LXV., r. 1, and the provision in clause (i.) of the First Schedule to the Arbitration Act, 1889, which would justify one in saying that in the one case there is an absolute discretion but not in the other; and clause 14 of the Second Schedule to the Agricultural Holdings Act, 1908, seems to me to be to the same effect. There seems to me to be nothing in the words themselves showing any distinction. Clause 14 provides that the costs shall be "in the discretion of the arbitrator, who may direct to and by whom and in what manner these costs" are to be paid. Then follows clause 15, which I think is merely a direction to the arbitrator; it does not give him the power over the costs; that is given by clause 14. The words of Order LXV., r. 1, say that the costs shall be "in the discretion of the Court or judge." There the words are the same as those of clause 14. That argument, however, does not go the full length of making it necessary for us to hold that the discretion of the arbitrator is to be fettered in the same way as that of the Court or judge. I have had much doubt in coming to a decision, but I think that, whilst the Court

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has laid down rules to bind us in the use of our discretion in the matter of costs, it is rather more in accordance with the principle of arbitrations, under which people choose for themselves their own tribunal, to say that the discretion is unfettered, and therefore the arbitrator can do what he likes with the costs and is not fettered by the rules that have been laid down by the Court.

Under those circumstances I am not prepared to say that we can set aside the award on the ground that it is wrong. Although I feel great doubt, I think that we ought to dismiss the appeal.

LORD COLERIDGE J. It being conceded that there is no power to send the award back to the arbitrator for review and that the only course in this case is to uphold the award or to set it aside, it appears to me there are only two grounds upon which it can be set aside: first, that the arbitrator, having a fettered discretion as to costs, has not exercised that discretion judicially; or, secondly, that he has been guilty of such misconduct as would entitle this Court to say the award should be set aside.

As regards the first point, it appears to have been constantly the practice in Chancery, at any rate, for successful applicants to be mulcted in the costs of their opponents, and before the Arbitration Act the case of *In re Fearon and Flinn* (1) shows that where parties voluntarily choose their own arbitrator and entrust him with complete discretion as to costs, in the absence of misconduct he can award what costs he will and to which party and in what manner. Then the Arbitration Act, 1889, provides that costs shall be "in the discretion of the arbitrator, who may direct to and by whom and in what manner those costs or any part thereof shall be paid." It is difficult to see what wider words could give any further discretion than that, and I have listened in vain for any authority to show that it would not be within the power of an arbitrator under that Act to mulct a successful party in the payment of his opponent's costs. There is no such authority, and, unless one could see anything limiting the discretion in the words that I have quoted, I cannot see why there should not be such a power. These Courts have imposed rules upon themselves and have limited in a

(1) L. R. 5 C. P. 34.

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large measure the discretion as to costs of judges and of arbitrators under the Workmen's Compensation Act, and it has been held that the discretion as to costs in awards under that Act must be judicially exercised, and that in certain cases it is not a judicial exercise of that discretion to make a successful party pay the unsuccessful party's costs. In *Cooper* v. *Whittingham* (1) it was held that where a plaintiff comes to enforce a legal right the Court has no discretion and cannot take away the plaintiff's right to costs; but that refers only to actions. The Agricultural Holdings Act gives this discretion: [The learned judge read clause 14.] That seems to me to re-enact, in substance, the provision as to costs in the Arbitration Act, 1889; and there was a reason for that, because the Agricultural Holdings Act expressly provides (s. 13) that the Arbitration Act shall not apply to any arbitration under this Act. The point has been made that r. 15 of the Second Schedule to this Act in some way fetters the complete discretion which, in my opinion, has been conferred upon arbitrators by r. 14. I do not think it does. It explains it, but I do not think it fetters it. It runs as follows: [The learned judge read clause 15.] I think that is plain and in no way fetters the complete discretion conferred upon him by the other rule though it governs its exercise. If I am right in that, he has a complete discretion.

The only other question is whether, in acting as he has done, he has been guilty of misconduct, and that involves another set of considerations altogether. I do not think we have sufficient knowledge of all the circumstances of the case, which he says he has taken into consideration. We know that a very exorbitant claim was made, and it may be that the arbitrator might reasonably think that the arbitration was practically forced upon the tenant by its unreasonableness, and that if a reasonable claim had been put forward no arbitration would have resulted. If that be the case, then the discretion given him by the Agricultural Holdings Act would seem to be ample to enable him to do what he has done. It is quite clear, I think, that if Order LXV. and the cases under the Workmen's Compensation Act govern this case he would have no power to do what he has done, unless the tenant was substantially the successful party; but I do not think it is necessary for

(1) 15 Ch. D. 501.

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me to say whether or not the landlord or the tenant was successful, because I base my decision upon other grounds. It is sufficient for me to say that I can find no case which says that, when an arbitrator has a complete discretion, the mere bare fact that he has awarded costs against the party who has succeeded is in itself misconduct. If there was any such case I should have no hesitation in setting the award aside. When there is no such case I think misconduct must be proved, and therefore we have no reason on either ground for upsetting the award.

Appeal dismissed.

F. W. Wynn Werninck, for the arbitrator, who had been served with notice of the appeal, applied for costs, and cited *Moseley* v. *Simpson*. (1)

RIDLEY J. We are both agreed that the arbitrator cannot have costs.

Solicitor for appellant: *H. S. Knight-Gregson.*

Solicitors for respondent: *Church, Adams & Prior, for P. W. Snelling, Winchester.*

(1) (1873) 42 L. J. (Ch.) 739.

J. H. W.

In re YEATMAN.

1915
Dec. 13.

Bankruptcy — Practice — Taxation of Costs — Payment — Adjudication annulled—Debtor's Application to reopen Taxation—Discretion of Court.

A bankrupt obtained the annulment of his adjudication on providing for the payment of his debts in full. He then applied to reopen the taxation of the bill of costs of the trustee's solicitor, which had been taxed and paid more than two years previously, on the grounds (1.) that it had been taxed on a wrong principle; (2.) that items had been allowed for work done before the committee of inspection had authorized the work; and (3.) that items had been allowed for work wholly unauthorized:—

Held, that, although the Court might in the exercise of its discretion reopen a taxation in a proper case, no special reason was shown for reopening a taxation that had taken place at a time when the bankrupt had no interest whatever in the administration of his estate in bankruptcy.

The application was therefore refused.

Application to review a taxation of costs.

On October 17, 1910, a receiving order was made against the debtor, and on December 8, 1910, he was adjudicated a bankrupt. Subsequently a trustee was appointed without a committee of inspection, so that under s. 22 of the Bankruptcy Act, 1883, the substance of which is reproduced in s. 20 of the Bankruptcy Act, 1914, the Board of Trade became the committee of inspection acting through the official receiver.

The official receiver, acting as committee of inspection, from time to time authorized the trustee to employ Mr. Tucker as his solicitor in certain matters. In each case the work to be done was specified and a limit was fixed for the costs, as follows:—

December 29, 1911.—Proceedings against the mother of the debtor to recover 1350*l.* and the costs were limited to 25*l.*; but by a further authority given on March 4, 1912, this limit was extended to 35*l.*

March 4, 1912.—(1.) To prepare a case for counsel on the construction of certain settlements, (2.) to recover a certain policy of assurance, (3.) to serve a notice on the parties to a certain action;

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and the costs under (*a*) were limited to 10*l.*, under (*b*) to 1*l.*, and under (*c*) to 2*l.*

March 13, 1912.—To appear on an application in the bankruptcy, and the costs were limited to 12*l.*

April 11, 1912.—(*a*) To advise on a certain proof, (*b*) to appear in a certain action, and (*c*) to commence certain proceedings. The costs under (*a*) were limited to 5*l.*, under (*b*) to 2*l.*, and under (*c*) to 20*l.*

November 7, 1912.—To appear on a motion to expunge a proof, and the costs were limited to 12*l.*

December 17, 1912.—To appear on an appeal from an order of Phillimore J., and the costs were limited to 12*l.*

The total amount of costs authorized under the above authorities was 111*l.* In February, 1913, Mr. Tucker carried in for taxation one bill of costs in which he included all the above separate matters. All the authorities were produced to the taxing Master, and he taxed and allowed the bill at 110*l.* 13*s.* 10*d.*, including the costs of taxation, and in March, 1913, Mr. Tucker received payment from the Board of Trade.

By May, 1915, the debtor had paid 10*s.* in the pound to his creditors, and proposed to pay the balance of his debts in full and to apply for the annulment of his bankruptcy; and on May 31 he applied to the Court for an order that the bill of costs of Mr. Tucker might be reopened, that the allocatur which had been issued in respect of such taxation might be set aside, and that the bill of costs might be referred to the taxing Master for taxation on the basis of the authorities given by the official receiver in bankruptcy as committee of inspection. But the application was ordered to stand over generally.

On November 25, 1915, the order of adjudication against the debtor was annulled, his debts having been paid in full, except one the amount of which had been paid into Court, and his application to review the taxation of Mr. Tucker's bill of costs now came on again.

E. W. Hansell, for the debtor. The application is against the solicitor who has been paid too much out of the estate. The trustee personally has no present interest and is not a necessary party;

the bankrupt could not apply whilst the administration in bankruptcy was going on, and was not entitled to notice of the taxation.

[HORRIDGE J. I think this motion is not properly constituted. I do not see how you can reopen the taxation without the trustee being a party to the application: *In re Geiger*. (1)]

F. Schiller, K.C. I appear for the solicitor, and I can also appear for the trustee.

[HORRIDGE J. That will get over the difficulty.]

E. W. Hansell. There are three objections to the taxation. In the first place, the taxation has proceeded on a wrong principle and contrary to the settled practice in bankruptcy. A separate bill of costs ought to have been carried in and taxed under each authority: *In re Duncan*. (2) The effect of including all the costs in one bill was to make all the authorities supplemental to each other, so that where the limit of one authority was exceeded the excess was made good out of any other authority in which the work had not reached the limit. By this means Mr. Tucker has been paid out of the estate some 15*l*. more than he ought to have received. The amount is small, but it is a question of principle and not of quantum. The taxing Master had no power to depart from the usual practice. Secondly, items have been allowed for work done before the authority was granted. And, thirdly, the bill also contains charges for work done which was not authorized at all. It is submitted that these objections are special reasons why the Court in the exercise of its discretion should allow the bankrupt to reopen this taxation: *In re Geiger* (1); *In re Duncan* (2); *In re Vavasour*. (3)

F. Schiller, K.C., and *P. B. Morle*, for the respondents, were not called upon.

HORRIDGE J. This is an application by the bankrupt to reopen the taxation of a bill of costs. The facts are shortly these. During the bankruptcy a bill of costs was carried in for taxation in February, 1913, and an allocatur was given in the same month, which was paid in the following March. Now, at the end of 1915, this application is made by the bankrupt to interfere with the administration of his estate in the bankruptcy, such administration having taken place at

(1) [1915] 1 K. B. 439. (2) [1892] 1 Q. B. 331, 879.
(3) [1900] 2 Q. B. 309.

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a time when he had no interest whatever apart from his trustee in the matter. It is clear on the authority of *In re Duncan* (1), *In re Vavasour* (2), and *In re Geiger* (3) that in a proper case this Court has a discretion to allow a bankrupt to attend on a taxation of costs. But in each of those cases the application was made by the bankrupt at the time when the taxation was pending, with this qualification, that in *In re Geiger* (3), owing to his not being given notice of the date or time of the taxation, he asked to attend without his knowing it was taking place. In each of those cases at the time he applied for leave to attend the taxation his was the pocket out of which the costs were to be paid. In *In re Geiger* (3) Lush J. and I thought it was pre-eminently a case where the bankrupt ought to be allowed to attend, and the Court of Appeal agreed with that view. Those cases are as far apart from this case as cases can possibly be. Here at the time of the taxation the costs were not going to be paid out of the bankrupt's estate and he would have had no chance of obtaining leave to attend the taxation. Now he comes more than two years afterwards and says "I will show that this taxation proceeded on a wrong footing in three ways." First, he says *In re Duncan* (1) decides that the committee of inspection or the Board of Trade, as the case may be, must authorize the work to be done on each occasion and fix a limit for the costs. In this case they authorized various matters on six different occasions and limited a sum for costs in each case, and it is said that on the taxation all these sums were added together and the total amount treated as an authorized sum against the bill of costs as a whole, whereas the taxing Master ought to have taken each piece of work authorized and seen whether the costs charged for the work done were within the limit authorized for that specific piece of work, and if a margin was left that margin could not be carried over to another authorized piece of work. I think there is a good deal to be said for that objection, but I am not going to decide it on this application. The second objection is that items are charged in respect of work done before the authorities were given. Lastly it is said that items are allowed in respect of work that was wholly unauthorized. The two last matters are pre-eminently matters for the discretion of the taxing Master.

(1) [1892] 1 Q. B. 331, 879. (2) [1900] 2 Q. B. 309.
(3) [1915] 1 K. B. 439.

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If I were to reopen this taxation and to allow the bankrupt to attend, it seems to me that in any case where the bankruptcy has been closed and the bankrupt has paid in full he would be entitled to come to the Court and say "If the bill had been properly taxed, although I was not entitled to attend the taxation, I should have had more money out of the estate, and the solicitors have been paid too much." I know of no authority that gives him any such right. In the decided cases he was given the right to attend where the taxation was actually taking place, or where he had been prevented from attending the taxation by not being told the date when it was taking place. Here the taxation has taken place with the proper parties more than two years ago. I do not say that in a proper case I might not have the power to reopen a taxation. But I do say that in the circumstances of this case no special reason is shown why I should exercise my discretion by allowing the bankrupt to come in now and raise objections to the taxation, even if those objections, when raised in a proper case, might be held to be good. I therefore dismiss the motion with costs.

Solicitors: *Tarry, Sherlock & King; I. Tucker.*

H. L. F.

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Dec. 7, 15.

THE KING *v.* BISHOP OF SARUM.

Ecclesiastical Law—Churchwarden—Refusal by Bishop to allow Churchwarden to make Declaration—Duty of Bishop.

Where a person to whom no statutory or common law disability attaches has been elected to the office of churchwarden, the Bishop is bound to admit him to make the declaration required by s. 9 of the Statutory Declarations Act, 1835, notwithstanding that the Bishop judging from his known character or from his words or conduct may not consider him a fit and proper person to hold the office of churchwarden.

RULE directed to the Bishop of Sarum calling upon him to show cause why a mandamus should not be issued commanding him to admit Frank Oliver Kent to make his declaration as a churchwarden under s. 9 of the Statutory Declarations Act, 1835. (1)

Kent was elected people's churchwarden for the parish of Melcombe Bingham in 1914. During his year of office, namely, on March 7, 1915, at the close of the service and near the chancel steps, he made use of filthy and indecent language to the rector and in the presence of the rector's wife. At the Easter vestry meeting for 1915 Kent was again elected people's churchwarden for the next year, and subsequently, namely, on April 27, he was summoned before the magistrates for his violent and indecent conduct in church on March 7 and was convicted and bound over to keep the peace for six months. The year 1915 was the year of the Bishop's visitation, and not of the archdeacon's, and the Bishop appointed June 17, at Dorchester, for taking the declarations required of the churchwardens. When Kent attended, the Bishop, by his chancellor, refused to admit him to make his declaration on the ground that, in view of the conviction and the nature of the language used by him, the Bishop did not consider that he was a fit and proper person

(1) Sect. 9 of the Statutory Declarations Act, 1835 (5 & 6 Will. 4, c. 62), substitutes a declaration for the oath of office previously required from churchwardens and sidesmen before entering upon the execution of their duties. The declaration is to be made in the presence of the Ordinary or other person before whom but for the Act the oath could have been taken.

to be admitted as a churchwarden. Kent thereupon obtained this rule.

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E. W. Hansell, for the Bishop of Sarum, showed cause. The Court, when asked to grant a writ of mandamus, is entitled to have regard to all the circumstances and in its discretion to refuse the writ: *Reg.* v. *Garland.* (1) In that case Cockburn C.J. said: "I rest the refusal of the writ [of mandamus] entirely on the special circumstances of the case, and on the ground that, in the exercise of that discretion which we have to grant or refuse the extraordinary process of the Court, we ought to refuse it in the present case." That principle was affirmed in *Reg.* v. *Churchwardens of All Saints, Wigan* (2), where Lord Chelmsford said that "The Court may refuse to grant the writ not only upon the merits, but upon some delay, or other matter, personal to the party applying for it; in this the Court exercises a discretion which cannot be questioned." Those observations are directly applicable to the present case, where the applicant's conduct has been such as to render him unfit to hold the office of churchwarden.

Secondly, the Bishop, in the exercise of his discretion, was entitled to refuse to admit the applicant to the office of churchwarden. It is not correct to say that the Bishop's duty in this matter is purely ministerial. In *Anthony* v. *Seger* (3), where an alien was held to have been properly rejected, Sir William Scott said: "If a parish had returned a papist, or a Jew, or a child of ten years of age, or a person convicted of felony, I conceive the Ordinary would be bound to reject." The reason why those persons could not be elected was that either by reason of their religion or on other grounds they were not fit persons to fill the office of churchwarden. So, in view of the duties which fall to be discharged by a churchwarden, one of the principal being, as was said by Sir William Scott in *Cox* v. *Goodday* (4), "the duty of maintaining order and decorum in the church," the Bishop was justified in refusing to admit the applicant, who had been guilty of the very conduct which it would be his duty to repress. Further, the fact that the Bishop may consider

(1) (1870) L. R. 5 Q. B. 269, 272.
(2) (1876) 1 App. Cas. 611, 620.
(3) (1789) 1 Hagg. Con. 9, 10.
(4) (1811) 2 Hagg. Con. 138, 141.

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whether there has been a valid election of the person claiming the office shows that his function is not merely ministerial: *Rex* v. *Harwood* (1); *Rex* v. *Williams*. (2) The case of *Morgan* v. *Archdeacon of Cardigan* (3) is said to support the contrary view, but all that that case decided was that a return by the archdeacon to a mandamus to swear in a churchwarden that the person was "pauper lactarius et servus minus habilis" was an insufficient return.

[Low J. We cannot disregard the reason given by the Court in that case, which was that it was for the parish to elect and not for the archdeacon to control the election.]

In *Reg.* v. *Sowter* (4) Lord Alverstone C.J. considered that in this matter the Bishop's duty is ministerial, but in the same case in the Court of Appeal (5), which reversed the actual decision of the Divisional Court, it was not necessary to deal with this point, the real question for decision being whether during the triennial visitation of the Bishop the duty of the archdeacon as to admitting churchwardens was suspended so that he could not be ordered by mandamus to do so. No question there arose as to personal fitness or unfitness for the office of churchwarden. No case has decided that the Bishop is bound to admit a person to the office who either by reason of physical inability or of misconduct is considered by the Bishop not to be a fit and proper person, and this Court should refuse to decide that he is so bound.

Barrington-Ward, in support of the rule. The fitness of a person for the office of people's churchwarden is a question for the parish and not for the Bishop, and if a person is duly qualified and duly elected the duty of the Bishop as to admitting him is purely ministerial. In *Stutter* v. *Freston* (6) it was said "that though the parishioners and parson neglect for ever so long to choose churchwardens, yet the Ordinary has no jurisdiction. . . . . The 89th and 90th canons say that churchwardens shall be chosen by the parson and parishioners, and if they disagree, then one by the parson and the other by the parishioners." It follows that the Bishop has no power to refuse the admission of the person chosen

(1) (1725) 2 Ld. Raym. 1405.
(2) (1828) 8 B. & C. 681.
(3) (1696) 1 Salk. 166; S. C. sub nom. *Rex* v. *Rice*, 1 Ld. Raym. 138.
(4) [1901] 1 Q. B. 66.
(5) [1901] 1 Q. B. 396.
(6) (1717) 1 Str. 52.

by the parish unless he comes within the class of disqualified persons enumerated by Sir William Scott in *Anthony* v. *Seger*. (1) Although it is true that the only point decided in the Court of Appeal in *Reg.* v. *Sowter* (2) was that the archdeacon could not, during the Bishop's triennial visitation, admit a churchwarden, it was assumed by every one that the Bishop's duty was merely ministerial. [He also cited *Rex* v. *Harris* (3), *Ex parte Lowe* (4), and *Rex* v. *Archdeacon of Litchfield and Coventry*. (5)]

If it is said that the applicant is an unfit person for the office, proceedings can be taken in the Ecclesiastical Court for his removal: see Phillimore's Ecclesiastical Law, 2nd ed., vol. 2, pp. 1489 et seq.; but in those proceedings the applicant would be entitled to be heard, and if he apologized for his wrong-doing the Court might report that he was a fit and proper person. If the contention of the Bishop is right that he is entitled to refuse to allow the applicant to make the declaration required by s. 9 of the Statutory Declarations Act, 1835, the applicant would be in this curious position, that he would be liable to penalties for not performing the duties of the office, for, having been in office during the previous year, he continues in office until a new churchwarden is elected and has made the declaration: see Cripps' Clergy Law, 6th ed., p. 181; and the parish cannot elect a new churchwarden unless the applicant is duly removed.

As to the contention that this Court has a discretion to grant or refuse a mandamus, that discretion must be exercised according to well-settled principles. If a person has a right, and no other remedy is open to him for asserting it except mandamus, the writ will be issued: *In re Barlow* (6); *Reg.* v. *Registrar of Joint Stock Companies*. (7) In this case the applicant is without a remedy if a mandamus is refused.

Cur. adv. vult.

Dec. 15. RIDLEY J. read the following judgment of the COURT (Ridley, Lush, and Low JJ.), which, after stating the facts already set out, continued as follows: If the Bishop had a discretion to

(1) 1 Hagg. Con. 9.
(2) [1901] 1 Q. B. 66.
(3) (1763) 3 Burr. 1421.
(4) (1835) 4 Dowl. 15.
(5) (1835) 5 N. & M. 42.
(6) (1861) 30 L. J. (Q.B.) 271.
(7) (1888) 21 Q. B. D. 131.

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examine into character before admitting or refusing to admit a churchwarden, it can hardly be questioned that he made a reasonable use of that discretion; but if the Bishop in so doing had a merely ministerial duty to perform, then, it was argued, a mandamus should go to order him to perform it. It was, however, contended in showing cause against the rule that this Court has in all cases a discretion in issuing such a writ, and that under all the circumstances they ought to decline to do so. On this point *Reg.* v. *Garland* (1) was quoted. In that case there had been a devise of copyhold estate to trustees in trust for an heir. The trustees had not been admitted, but they applied on behalf of the heir for a mandamus to compel his admittance. They had the right to admittance, as it is a mere form: see Scriven on Copyholds, 7th ed., p. 121. But the Court discharged the rule on the ground that the application was not a bona fide one, but was made in order to avoid paying double fees for admittance, and on the ground that the Court had no information as to the age of the heir. This decision appears to us not to be an authority for the argument in the present case. The trustees and the heir could have had admittance on paying the fees due, whereas here the applicant cannot do so by any means except that of making the declaration required. In other words, the right which the applicant there sought to enforce by mandamus was a private right, which could be in substance secured by another process. In the present case the right to perform the duties, which are of a public character, cannot be secured at all if a mandamus is refused. We do not think that in such a case as this the issue of the writ is discretionary, assuming that the Bishop's duties are only ministerial.

The main question in the case is not devoid of authority. In *Rex* v. *Rice* (2) a mandamus was directed to the Archdeacon of St. Asaph to admit a churchwarden duly elected by the parish. On the return to the writ it was set out that the churchwarden was not a fit and proper person, being a dairyman in poor circumstances. But it was held that the archdeacon could not refuse for such cause the churchwarden, who is an officer of the parish and holds an office merely temporal, having the custody of and the property in the goods belonging to the church. To the same effect is the case of

(1) L. R. 5 Q. B. 269. (2) 1 Ld. Raym. 138.

Rex v. *Simpson*. (1) The archdeacon in effect was held to be in that case a ministerial officer. In *Rex* v. *Williams* (2) it was held, on the other hand, where there was a mandamus to admit a churchwarden, that a return that he had not been duly elected was a good one; and it was said by Parke J. that the commissary "cannot exercise any judicial authority, but he may inquire whether the party has been duly elected." In *Reg.* v. *Sowter* (3) a question arose whether the Bishop or the archdeacon could properly admit a churchwarden, the Bishop having inhibited him during his triennial visitation from exercising any spiritual or ecclesiastical jurisdiction concerning the visitation of the clergy, the admission of churchwardens, and so forth. In making the rule absolute Lord Alverstone C.J. gave judgment approving the decision in *Rex* v. *Simpson* (1), and said that a churchwarden had long been regarded as substantially a temporal officer, and that as the act of the archdeacon in admitting him was merely ministerial the Bishop could not inhibit him from performing it. Kennedy J. agreed with this judgment. The Court of Appeal reversed this decision, and held that, while the archdeacon was inhibited by the Bishop, he could not exercise any jurisdiction at all, but they did not in any way differ from what had been said in the Court below as to the character of the office of churchwarden or the duty of the archdeacon in admitting him.

It would not be correct to conclude from these authorities that there are no duties in the performance of which a churchwarden acts for the Ordinary and subject to his control. Thus in *Fuller* v. *Lane* (4) Sir John Nicholl, in the Arches Court of Canterbury, in dealing with the pews in a parish church, said: "The distribution of seats rests with the churchwardens, as the officers, and subject to the control, of the Ordinary." See also *Halliday* v. *Phillips*. (5) There may be other such duties in the performance of which the churchwarden is not independent of the Ordinary, but we do not think that such a relationship in respect of one particular duty or of several particular duties can affect the general rule laid down in the authorities quoted above.

Reliance was, however, placed upon the words used by Sir

(1) (1725) 1 Str. 609.
(2) 8 B. & C. 681, 683.
(3) [1901] 1 Q. B. 66.
(4) (1825) 2 Add. Ecc. 419, 425.
(5) (1889) 23 Q. B. D. 48, 53.

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William Scott in *Anthony* v. *Seger*. (1) That was a case decided in 1789 upon a question relating to an election of churchwardens for the parish of Ealing. Three persons were nominated, and of these Le Cornu received thirty-eight votes on a poll, Wincuffe received thirty-five, and Anthony received none. On it being objected that Le Cornu was an alien he admitted it and was declared ineligible, and the question was whether Anthony could be declared elected, although he had received no votes at the poll. The Court ordered a re-election, but in giving his judgment Sir William Scott said: "An alien born has no right. . . . . The fact therefore being admitted, that person was properly rejected. A contrary position has indeed been intimated, and it has been said that there would be ground for a mandamus,—but inaccurately, for offices the most ministerial leave a discretion not to join in an illegal act, and if a parish had returned a papist, or a Jew, or a child of ten years of age, or a person convicted of felony, I conceive the Ordinary would be bound to reject." It seems to be quite clear that the learned judge was dealing in this passage with statutory or common law disabilities only. He says there is still discretion not to join in an illegal act and quotes as instances of such an act only cases where the persons would be actually disqualified for the office. That is a very different thing from the contention raised in the present case that the Ordinary may reject a churchwarden because (however reasonably) he arrives at the conclusion that from his known character or from his acts, words, or conduct he is not a fit and proper person. We think this is the proper meaning of the case itself. It may be further noted that it was decided in 1789 by a very great authority, and that it does not appear from later decisions ever to have been construed in the sense which it has now been suggested it might bear. We think for these reasons that the rule should be made absolute.

Rule absolute.

Solicitors for applicant: *Rawle, Johnstone & Co., for J. Trevor-Davies, Yeovil.*

Solicitors for Bishop of Sarum: *Lee, Bolton & Lee.*

(1) 1 Hagg. Con. 9, 10.

J. S. H.

WOKING WATER AND GAS COMPANY, APPELLANTS *v.* PARKER, RESPONDENT. 1915 *Dec.* 16.

Water Company—Supply of Water—Water Rate—Net Annual Value—Gross estimated Annual Rental—General Act "expressly varied" by Special Act—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *s.* 68—*Woking Water and Gas Act*, 1881 (44 & 45 *Vict. c. cxvi.*), *ss.* 2, 49.

The special Act of a water company incorporated the Waterworks Clauses Act, 1847, "except where expressly varied by" the special Act. Sect. 68 of the Waterworks Clauses Act, 1847, provides that the water rates, except as thereinafter and in the special Act mentioned, shall be payable according to the annual value—which has been held to mean the net annual value—of the tenement supplied with water. A section (s. 49) of the special Act provided that the company should furnish water at rates not exceeding the yearly rates thereinafter specified, namely, where the gross estimated annual rental of the premises supplied should not exceed a certain amount, at a rate per cent. per annum not exceeding an amount specified:—

Held, that by this section the rate per cent. per annum was to be calculated upon the gross estimated annual rental and that s. 68 of the Waterworks Clauses Act, 1847, was expressly varied thereby.

CASE stated by justices of the county of Surrey.

A complaint was preferred by Christopher John Parker, the respondent, against the Woking Water and Gas Company, the appellants, alleging that a dispute had arisen between the respondent, a person requiring, receiving, or using a supply of water from the appellants, and the appellants as to the value of a tenement known as Inchmahome, Ridgway, in the parish of Horsell in the county of Surrey, supplied with water by the appellants, and that the respondent required the said dispute to be determined by two justices pursuant to the statute in such case made and provided. The justices fixed the annual value of the tenement for water rate at 109*l.*

On the hearing of the complaint the following facts were admitted:—

The respondent was the owner and occupier of the tenement, of which the gross estimated rental was 130*l.* and the rateable value 109*l.* The tenement was supplied with water by the appellants, a company incorporated under the provisions of the Woking Water and Gas Act, 1881 (44 & 45 Vict. c. cxvi.).

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By s. 2 of that Act a number of statutes and statutory provisions, including the Waterworks Clauses Acts, 1847 and 1863, are " (except where expressly varied by this Act) incorporated with and form part of this Act."

By s. 49, " The company shall at the request of the owner or occupier of any private dwelling-house or part of a private dwelling-house in any street in which any pipe of the company shall be laid or on the application of any person who under the provisions of this Act is entitled to demand a supply of water for domestic purposes furnish to such owner or occupier a sufficient supply of water for domestic use at rates not exceeding the yearly rates hereinafter specified (that is to say) :

" Where the gross estimated annual rental of the premises so supplied with water shall not exceed 20*l.* at a rate per centum per annum not exceeding 7*l.* 10*s.* . . . .

" Where such gross estimated annual rental shall exceed 100*l.* at a rate per centum per annum not exceeding 5*l.* Provided always " &c.

By the Waterworks Clauses Act, 1847, s. 68, it is provided as follows : " The water rates, except as hereinafter and in the special Act mentioned, shall be paid by and be recoverable from the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water, and if any dispute arise as to such value the same shall be determined by two justices."

The appellants contended that the tenement ought to be assessed for water rates upon the gross estimated annual rental mentioned in s. 49 of the Woking Water and Gas Act, 1881, and that if s. 68 of the Waterworks Clauses Act, 1847, had any application to water rates of the appellants the words " annual value " in such section meant a sum equivalent to the gross estimated annual rental of the premises supplied with water.

The respondent contended that the tenement ought to be assessed according to the annual value thereof, i.e., the net value or rateable value as distinguished from the gross estimated rental, on the grounds that by the Woking Water and Gas Act, 1881, s. 2, the provisions of the Waterworks Clauses Act, 1847, were incorporated with and were to form part of the Woking Water and Gas Act, 1881,

except in so far as they were expressly varied by that Act; that s. 49 of the Woking Water and Gas Act, 1881, did not vary s. 68 of the Waterworks Clauses Act, 1847, which must therefore be read as incorporated with the Woking Water and Gas Act, 1881; that s. 49 of the Woking Water and Gas Act, 1881, provides a scale according to which the water rate is made to vary with the gross estimated value of the premises, but that the section is silent as to the manner in which the rate is to be calculated; that the calculation is therefore left to be made in the manner provided by s. 68 of the Waterworks Clauses Act, 1847, i.e., on the net annual value of the premises.

The justices held that the contentions of the respondent were right and that the basis of charge was the net annual value or rateable value of the premises, and upon that principle of construction they decided that the water rates payable by the respondent to the appellants were payable on 109*l.* as the net annual or rateable value.

The question for the opinion of the Court was whether the justices came to a correct determination and decision in point of law.

Clavell Salter, *K.C.*, and *Paddon*, for the appellants. It was held in the House of Lords in *Dobbs* v. *Grand Junction Waterworks Co.* (1) that in an Act enabling a water company to charge water rates according to the annual value of a tenement the words "annual value" mean "net annual value." By s. 68 of the Waterworks Clauses Act, 1847, which is incorporated with and forms part of the appellants' special Act of 1881, the rate in the present case would be properly chargeable on the net annual value unless that section is "expressly varied" by the Act of 1881. The question is whether s. 68 of the Act of 1847 is expressly varied by s. 49 of the Act of 1881. It is submitted that it is so varied. When an Act provides that where the gross estimated annual rental of a tenement is so much a rate not exceeding so much per cent. per annum is to be paid, that means, and can only mean, that the rate per cent. per annum is to be calculated on the gross estimated annual rental: *South Staffordshire Waterworks Co.* v. *Barrow.* (2) Such an Act expressly varies an Act providing that the rate is to be paid according to the net annual value. Therefore the rate ought to be calculated upon

(1) (1883) 9 App. Cas. 49. (2) (1897) 61 J. P. 661.

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the gross estimated rental of 130*l.* and not, as the justices have decided, on the net rental of 109*l.*

Macmorran, K.C., and *J. D. Crawford*, for the respondent. Sect. 68 of the Act of 1847 is not expressly varied by s. 49 of the Act of 1881. The effect of the two enactments is that the tenements are to be classified according to their gross estimated annual rental: s. 49 of the Act of 1881. When that has been done the water rate appropriate to the tenement so classified is 5*l.* per cent., or 7*l.* 10*s.* per cent., or as the case may be, upon the net rental: s. 68 of the Act of 1847 as interpreted by *Dobbs* v. *Grand Junction Waterworks Co.* (1) When two enactments can stand together it cannot be said that one expressly varies the other. The construction of the Act of 1881 for which the appellants contend would add to s. 49 the words "on such gross estimated annual rental" after specifying the rate per cent., a method of construction which cannot be admitted where the words of the Act have a reasonable meaning without the addition.

RIDLEY J. In my opinion the decision of the justices cannot be supported, for although the words of s. 49 of the special Act are capable of the respondent's interpretation, that of the appellants is the more satisfactory, especially in view of the decision in *South Staffordshire Waterworks Co.* v. *Barrow.* (2) That section directs that the company shall supply water for domestic use at the rates specified, that is to say, where the gross estimated annual rental exceeds 100*l.*, "at a rate per centum per annum not exceeding 5*l.*" The section nowhere expressly mentions the amount or value on which the rate is to be calculated, but I think it means that the amount or value is to be the gross estimated annual rental. That is the basis of classification. *South Staffordshire Waterworks Co.* v. *Barrow* (2) is an authority in favour of this view. It is true that the principal decision in that case was as to which of two interpretations of an ambiguous enactment was to prevail, but it was assumed with regard to two enactments similar in their drafting to s. 49 of the special Act before us that the Legislature intended the particular rate in question to be charged on the basis of classification, which in the one case was the annual value and in the other

(1) 9 App. Cas. 49. (2) 61 J. P. 661.

the rack rent, although in neither case was there any specific enactment to that effect. With that case before me I must hold that the amount or value on which the 5*l.* per cent. per annum is to be calculated is the gross estimated annual rental of the tenement. The result is that the annual value, which has been interpreted to mean the net annual value, specified in s. 68 of the Act of 1847 has, within the meaning of s. 2 of the special Act of 1881, been expressly varied by the later Act and cannot prevail as the basis of calculation. The appeal must therefore be allowed.

AVORY J. But for the decision of the Court of Appeal in *South Staffordshire Waterworks Co.* v. *Barrow* (1) the arguments for the appellants and the respondent would in my opinion have been equally balanced. The question is whether s. 49 of the special Act of 1881 contains any enactment sufficiently clear to amount to an express variation of s. 68 of the Act of 1847. Sect. 49 might be read thus: "The company shall . . . . furnish . . . . a sufficient supply of water for domestic use at rates calculated on the annual value not exceeding the yearly rates hereinafter specified, that is to say," and so on. That would incorporate s. 68 of the Act of 1847, and if there is a reading of s. 49 which, while incorporating s. 68, does no violence to s. 49, I doubt whether there can be said to be anything in s. 49 of the special Act which expressly varies the terms of the general Act of 1847. On the other hand, s. 49 may be read in the manner indicated by Ridley J., namely, as enacting that the rates per cent. are to be calculated on the gross estimated annual rental.

It is not always safe to say that a decision is an authority on all points which might have been taken. It may depend upon the industry of counsel engaged whether a particular point was presented to the Court. When I consider who were counsel in *South Staffordshire Waterworks Co.* v. *Barrow* (1) I cannot accept the suggestion that the case passed through the stage of argument without some reference to the Act of 1847. If any assistance could have been derived from its provisions, beyond doubt it would have been invoked. I must take that case to have decided that where there are words, such as are found in s. 49 of the Act of 1881, to the effect that where the gross estimated annual rental is so much the rate of charge is to be so

(1) 61 J. P. 661.

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much per cent. per annum, that means that the rate per cent. is to be calculated on the preceding rental or value, gross or net, as the case may be. For these reasons I agree that the appeal should be allowed.

LUSH J. I agree with Mr. Macmorran that unless the special Act of 1881 on its true construction has substituted gross estimated annual rental for net annual value, the basis of calculation under the general Act of 1847, then the provisions of the general Act apply. That brings us to the question what is the true construction of s. 49 of the Act of 1881. It is to be observed that whereas s. 68 of the Act of 1847 mentions in the body of the section the basis on which the percentage is to be calculated, no such basis is mentioned in the body of s. 49 of the Act of 1881; recourse must be had to the sub-section in order to find the basis on which the percentage is calculated. The language of this sub-section is reasonably clear: when the gross estimated annual rental is so much the water rate is to be calculated at a rate per cent. per annum not exceeding 7*l.* 10*s.* and so on. If that does not mean 7*l.* 10*s.* per cent. on the gross estimated annual rental, why is gross estimated annual rental mentioned at all? I have heard no satisfactory explanation of its introduction into the sub-section except as being the basis of calculation. It does not occur in other Acts. There, when the Legislature intends annual value to be the basis of calculation of the percentage, annual value is also made the basis on which the tenements are classified. Similarly when in the Act of 1881 gross estimated annual rental is the basis of classification, and the occupiers of tenements so classified are rated at so much per cent. per annum, the inference is irresistible that gross estimated annual rental is intended as the basis on which the percentage is to be calculated. That was assumed as the natural meaning of a similar enactment in *South Staffordshire Waterworks Co.* v. *Barrow* (1), and I cannot entertain any doubt that the Legislature in the present case intended gross rental and not net rental as the basis of calculation.

Appeal allowed.

Solicitors for appellants: *Reynolds & Miles.*

Solicitor for respondent: *C. J. Parker.*

(1) 61 J. P. 661.

W. H. G.

MOORE AND ANOTHER *v.* EVANS.

1915
Dec. 16, 17.

Policy of Insurance—Goods consigned Abroad on "sale or return"—Outbreak of War with Country of Consignee—Prohibition of Consignee from dealing with Goods—Total Loss.

The plaintiffs, who carried on business as jewellers in London, insured their stock of jewellery for a year against "loss of or damage or misfortune to the property arising from any cause whatsoever." In July, 1914, they consigned certain articles of the jewellery so insured to merchants in Germany on sale or return. By the custom of the jewellery trade the person so receiving goods on sale or return has a limited time within which to make up his mind whether he will purchase the goods or return them. By reason of the outbreak of war the German merchants were prevented by law from dealing in any way with the jewellery, which was the property of British subjects:—

Held, that the fact that the consignees were indefinitely prevented from either purchasing the jewellery or returning it amounted to a total loss within the policy.

TRIAL of action before Rowlatt J.

The plaintiffs, who carry on business in London as dealers in jewellery and precious stones, insured their stock of jewellery in the sum of 45,000*l.* under a Lloyd's policy for a year from January 8, 1914, to January 7, 1915, against "loss of or damage or misfortune to the above mentioned property or any part thereof arising from any cause whatsoever." The policy, which was underwritten by the defendant, was expressed to cover the goods "while the same are (save as hereinafter provided) in or upon any premises or place whatsoever or being carried or in transit by land or water in the United Kingdom or any country in Europe, and also whilst being carried or in transit by sea from any port or place in the United Kingdom or Europe to any other port or place in the United Kingdom or Europe; Provided always that this policy shall not apply to any property whilst the same is in Spain or the Empire of Russia." In the months of June and July the plaintiffs sent certain articles of the jewellery so insured to the value of 8747*l.* to various dealers in Frankfurt and Brussels on sale or return, and upon the terms that the goods remained the property of the plaintiffs until invoiced by them. The evidence was that by the custom of the jewellery trade

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where goods are sent on sale or return the consignee has a fortnight or at the most a few weeks within which to exercise his option to purchase, unless the time is extended by agreement. On the expiry of the period of option the consignee, if he is not then ready to purchase, is bound to return them. War broke out between Germany and Great Britain on August 4, 1914, and on August 20 Brussels was taken and occupied by the Germans. By reason of the state of war the consignees of the jewellery were prevented by law from dealing with it in any way as it belonged to British subjects, and in consequence it was never returned to the plaintiffs. In February, 1915, the plaintiffs brought this action on the policy, claiming as for a total loss. There was no evidence that the jewellery had been seized or specifically interfered with by the German authorities. Some of it had been deposited by the consignees in a bank for safe custody, and the remainder was assumed to be still in their possession at the date of the hearing.

Leslie Scott, K.C., *Douglas Hogg*, and *Constantine Gallop*, for the plaintiffs. The jewellery was totally lost, both constructively and absolutely. The policy covered a series of voyages or transits to foreign or home customers and also the intervals when the goods were in the plaintiffs' own possession. If this had been a marine policy there could have been no question that the goods were a constructive total loss, for they were sent on voyages to Brussels and Frankfurt and back, and they never returned. In *Shepherd* v. *Henderson* (1) Lord Blackburn said that he took the law to be clear that where a ship has been by the perils of the sea so situated that the owner is deprived of his control over her and cannot use her unless he can get her out of that situation, which would generally both occupy time and involve expense, it was a constructive total loss. But the considerations which are taken into account for the purpose of determining whether there has been a constructive total loss under a marine policy must also be taken into consideration for the purpose of determining whether there has been a total loss under a policy on commercial goods on land: *Mitsui* v. *Mumford*. (2) The principle is applicable to all adventures of a commercial nature. Here it was impossible for the plaintiffs to recover possession of their goods, for

(1) (1881) 7 App. Cas. 49, 69. (2) [1915] 2 K. B. 27.

all intercourse with an enemy country was forbidden by law, and at the date of action brought Brussels had become enemy country. Secondly, the goods were an absolute total loss. "Every effective privation of the spes recuperandi amounts to an absolute total loss: if the thing insured be in the hands of strangers, not under the control of the assured; if, by any circumstances over which he has no control, it can never, or within no assignable period, be brought to its original destination—in such cases the fact of its remaining in specie at any forced termination of the risk is of no importance. The loss is in its nature total to him who has no means of recovering his property, whether his inability arise from its annihilation or from any other insuperable obstacle": Arnould on Marine Insurance, 9th ed., s. 1049. Here the deprivation is likely to continue for an indefinite time. Therefore the goods are lost in a commercial sense, and within the meaning of the policy.

Gordon Hewart, *K.C.*, and *Patrick Hastings*, for the defendant. There is here no loss, but only a temporary inability of access. Temporary deprivation of possession is not loss. This policy is not an insurance of a series of transits or commercial adventures, but a time policy on the goods themselves, and the doctrine of "the destruction of a contemplated adventure" has no application to such a case. The case of *Mitsui* v. *Mumford* (1) is against the plaintiffs, for there, as here, the owners lost the power of immediately dealing with their timber, but Bailhache J. held that that showed only a loss of market, not a loss of the goods. Both that case and *Beal* v. *Horlock* (2) show that in the absence of any evidence to the contrary it must be presumed that the German Government will act in accordance with the rules of international law, and will not confiscate the property, but will allow the owners to resume possession of it after the war.

Douglas Hogg in reply. With reference to that portion of the judgment in *Mitsui* v. *Mumford* (1) in which it was held that the inability of the plaintiffs to deal with their goods did not amount to an actual loss, the facts of that case are distinguishable from those in the present. There the evidence was that the plaintiffs not infrequently had timber lying in their warehouses for many months before they were able to sell it. There a rapid turnover was not

(1) [1915] 2 K. B. 27. (2) [1915] 3 K. B. 627.

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essential, but here it is. Here the consignees were bound to return the jewellery immediately on the expiry of the fortnight or other period limited for the exercise of their option; and the fact that they were unable to do so amounted to an actual total loss.

ROWLATT J. This is an action to recover a loss under a policy on jewellery. The plaintiffs are jewel merchants in London. The jewels in question had been consigned by them to persons resident in Germany or in a place now in the permanent occupation of the Germans, and they say that by reason of the jewels being in enemy country they are totally lost within the meaning of the policy. The policy covers the jewels, whether they be the property of the plaintiffs or only entrusted to them for one or other of the purposes therein mentioned, "while the same are (save as hereinafter provided) in or upon any premises or place whatsoever or being carried or in transit by land or water in the United Kingdom or any country in Europe, and also whilst being carried or in transit by sea from any port or place in the United Kingdom or Europe to any other port or place in the United Kingdom or Europe; Provided always that this policy shall not apply to any property whilst the same is in Spain or the Empire of Russia." The perils are expressed to be "the loss of or damage or misfortune to the above mentioned property or any part thereof arising from any cause whatsoever."

The next matter to be observed is that although in this policy transit is mentioned, it is not a policy which insures the transit of the goods; it is a policy on the goods themselves. It insures them whether they are in transit or not. What is meant by the reference to transit is that the transit is not to make the risk cease to attach, but that they may be in transit without prejudice to the policy, and for that reason I think that a great deal of the argument that was addressed to me on behalf of the plaintiffs was beside the point. It was said that it is a familiar doctrine of marine insurance that if goods are insured for a voyage, and that voyage is frustrated, although the goods themselves are not lost, notice of abandonment can be given and recovery may be had as for a constructive total loss; and then it was said that the consignment of these goods to the Continent on sale or return was like a voyage, and that as they have been prevented from returning the transit was equivalent to a

voyage which has been frustrated. If this were a policy insuring the goods from London to Germany and back I will assume, without deciding it, that the argument might have succeeded. But this is not a policy of that kind at all. It is a policy which insures the safety of the goods during the periods, amongst others, when they are in transit, but it does not insure the safe transit of the goods in the sense which I think is necessary. The matter may be tested in a very simple way. If the goods had been sent by post to a country the Government of which had made a law that such goods should not be imported by post, and on their arrival at the frontier they had at once been sent back again, so that they never reached their destination, it could not possibly be suggested that the owners could recover as for a total loss under such a policy as this. In the next place it was contended for the plaintiffs that there was an actual loss of the goods. The jewellery was sent on sale or return, on the footing that it remained the property of the plaintiffs until invoiced to the consignee, and it was proved before me that according to the practice of the trade well known to everybody the consignee has about a fortnight within which to make up his mind whether he will buy the goods, and if on the expiry of that time he is not ready to buy them he is bound to return them unless the time is extended by the consignor. Under those conditions the goods were in Germany. There is no evidence that anything has happened to the goods themselves in respect of their physical custody. They have not been specifically interfered with. Some of them when last heard of were in a bank in the names of the plaintiffs' consignees. None of them have been taken out of the possession of the consignees. But the plaintiffs cannot deal with them; they cannot get to them. Mr. Leslie Scott says that for that reason the goods are lost, the plaintiffs being indefinitely deprived of the possession and control over them. I do not think that that would be enough to constitute a loss under this policy. It would include a case of mere non-access. If the plaintiffs had been taken prisoners and not allowed to communicate with the place where their goods were it would be an abuse of language to say that there had been any loss of or misfortune to the goods. Therefore Mr. Leslie Scott's proposition is too wide when he says that the mere deprivation of the power to deal with the goods amounts to a loss. But that does not dispose of the case,

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for there is another matter to be considered. The goods, it is true, have not been physically interfered with, but the persons in whose possession they are on behalf of the plaintiffs, and who in the ordinary course would have to purchase them or return them, are prevented by what has happened from doing either of those things. The goods themselves are for an indefinite time locked up in their hands and detained from the plaintiffs by the law which prevents them from dealing with the property of British subjects. Under those circumstances I am of opinion that the plaintiffs are entitled to recover as for a loss of the goods. I was pressed with the decision of Bailhache J. in *Mitsui* v. *Mumford* (1), where the fact that Japanese owners of timber warehoused in Antwerp were prevented by reason of the war from dealing with their timber was held not to amount to a loss of the timber. But there the timber was intended by the owners to remain in Antwerp until sale, and what was decided was that an indefinite postponement of the sale amounted only to a loss of market and not to a loss of the goods. But here the intention was that the jewellery unless sold within a limited time should be reconsigned to this country ; and the German consignees have not merely been prevented from selling the goods, but also from performing the alternative of returning them. There will be judgment for the plaintiffs for a total loss.

Judgment for plaintiffs.

Solicitors for plaintiffs : *W. Hurd & Son.*
Solicitors for defendant : *Windybank, Samuell & Lawrence.*

(1) [1915] 2 K. B. 27.

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1915
Nov. 18;
Dec. 15.

F. A. TAMPLIN STEAMSHIP COMPANY *v.* ANGLO-MEXICAN PETROLEUM PRODUCTS COMPANY.

Charterparty—Implied Condition—Tank Steamship—Time Charterparty—Employment for Carriage of Oil as Charterers should direct—Liberty to sub-let on Admiralty or other Service—Requisition of Steamship by Admiralty—Employment for Transport of Troops—Effect of Requisition—Restraint of Princes—Frustration of Adventure—Whether Charterparty put an end to or suspended.

By a time charterparty a tank steamship was chartered to be employed in such lawful trades for voyages between any safe ports within certain limits for the carriage of oil as the charterers or their agents should direct. The charterers were to pay for the use and hire of the vessel a fixed sum per month. The charterparty contained an exception (inter alia) of "arrests and restraints of princes" and the charterers had the liberty of sub-letting the steamer on Admiralty or other service. During the currency of the charterparty the steamer was requisitioned by the Admiralty and after necessary alterations was employed by them in the transport of troops. The charterers had paid and were willing to continue to pay the agreed freight, and contended that the contract was still subsisting:—

Held, that there was no implied condition in the charterparty that the steamer should remain fit for the carriage of oil; that the commercial adventure had not been frustrated, inasmuch as each party was deriving in substance, though not in form, a substantial part of the benefit they respectively contemplated obtaining from the enterprise, and there was nothing to prevent the charterers resuming the control of the vessel and completing the charter if and when the Government restored the vessel to them; and that consequently the requisition by the Admiralty of the steamer did not put an end to or suspend the charterparty.

Jackson v. *Union Marine Insurance Co.* (1874) L. R. 10 C. P. 125 distinguished.

Decision of Atkin J. [1915] 3 K. B. 668 affirmed.

APPEAL from a decision of Atkin J. (1) upon an award made by an arbitrator in the form of a special case.

The facts of the case and the contentions of the parties are fully stated in the report in the Court below. The question was whether a time charter, the period of which was still unexpired,

(1) [1915] 3 K. B. 668.

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had been determined by the act of the Government in requisitioning the ship as a transport and making certain structural alterations necessary to fit her for that purpose.

By the charterparty dated May 18, 1912, the F. A. Tamplin Steamship Company, Limited, as owners agreed to let and the Anglo-Mexican Petroleum Products Company, Limited, as charterers agreed to hire the British tank steamship *F. A. Tamplin* for sixty months expiring on December 4, 1917, to be employed in voyages between specified ports for the carriage of refined petroleum and/or crude oil and/or its products. The charterers were to pay for the use and hire of the vessel at the rate of 1750*l.* sterling per calendar month, which was at the expiration of the first twelve calendar months to be reduced to 1700*l.* a month. The charter contained conditions allowing, under certain restrictions, the carriage of cargo other than oil, and gave power to underlet without prejudice to the charterparty, and also contained an exception of (inter alia) restraints of princes, rulers, and people. The steamer was requisitioned by the Admiralty in December, 1914, and was altered to fit her for the transport of troops. The charterers had paid and were willing to continue to pay the agreed freight. They in fact received from the Government a substantially increased hire over and above what they paid to the owners, and contended that they were entitled to retain the surplus.

Atkin J. held that the requisition of the steamer by the Admiralty did not put an end to or suspend the charterparty.

From this decision the owners appealed.

Nov. 18. *G. Wallace, K.C.*, and *W. Norman Raeburn*, for the appellants. The requisitioning of the ship by the Government put an end to the charterparty. Having regard to this and to the consequent alterations which have been made in the structure of the ship, the charterparty can no longer be carried out at all. The ship has ceased to exist as a tanker; she has been rendered unsuitable for the purpose for which she was intended. There was an implied condition in the charterparty that the ship should continue to exist as a tanker, and as that condition, without any default on the part of the charterers, has become incapable of being fulfilled, the charterparty

must be treated as at an end: *Taylor* v. *Caldwell* (1); *Nickoll & Knight* v. *Ashton, Edridge & Co.* (2)

[BANKES L.J. In the latter case the contract never came into operation.]

That does not affect the principle. *Krell* v. *Henry* (3) affords another instance of the application of the same doctrine. Vaughan Williams L.J. there said: "*Nickoll & Knight* v. *Ashton, Edridge & Co.* (2) makes it plain that the English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract, and essential to its performance."

Further, it is submitted that the commercial adventure contemplated by both parties was entirely frustrated by the action of the Admiralty in requisitioning the ship. The contract was therefore determined and cannot be enforced by either party: *Jackson* v. *Union Marine Insurance Co.* (4) Through the act of a superior power the parties have been rendered unable to perform the conditions of the charterparty: *Cunningham* v. *Dunn.* (5) The user made of the ship is outside anything which was contemplated by the charterparty. It amounts to an entire repudiation of the contract.

Under the charterparty certain restrictions are put upon the user of the vessel. The result of the requisitioning of the ship may be that those restrictions will be transgressed. If the ship were returned to the owners in a badly damaged condition they would have no redress, for they would be met by the defence of "restraint of princes."

MacKinnon, K.C., and *R. A. Wright*, for the respondents. It is essential to bear in mind the real nature of this contract. It is not the case of the demise of a ship. The owner agrees to render certain services with his ship for the carriage of the charterers' goods. The charterers' obligation is to pay the monthly freight. The

(1) (1863) 3 B. & S. 826.
(2) [1901] 2 K. B. 126.
(3) [1903] 2 K. B. 740, 748.
(4) L. R. 10 C. P. 125.
(5) (1878) 3 C. P. D. 443.

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negative stipulations or restrictions are not covenants not to do certain things, but are rather limitations upon the user of the ship. The charterers are not speculating in tonnage, but merely hiring the ship to carry their goods. They cannot get a substitute except at a rate exceeding what they receive from the Government. The argument of the appellants must extend to this, that if the Admiralty required the use of the ship for one month only, the whole contract would be at an end. That is a fallacy, and the argument cannot be supported: *Brown* v. *Turner, Brightman & Co.* (1) The charterers are not in default and the contract is still subsisting. The charterers are not to be deprived of this valuable time charter, which still has three years to run, merely because the Admiralty have requisitioned the ship. The position is this. The shipowners remain in possession of the ship and give to the charterers the right to its services. The charterers are not bound to use the ship. They may delegate the use of it subject to certain limits and conditions. Their only obligation is to pay the stipulated hire punctually. Only upon their failure to do this does the right of withdrawal arise. They might lay up the vessel. The fact that the Admiralty desire to send her on a voyage makes no difference to the owners. That may be treated as a sub-letting. The doctrine of the commercial adventure being frustrated has never been applied to a time charter.

Wallace, K.C., in reply.

Cur. adv. vult.

Dec. 15. BANKES L.J.: The Master of the Rolls wishes me to say that he concurs in the judgments which are about to be delivered in this case by myself and Warrington L.J. This is my judgment:—

The question in dispute between the parties in this case is whether a time charter of the steamship *F. A. Tamplin* has been determined owing to the vessel having been requisitioned by the Government. The matter was referred to arbitration. The arbitrator, who stated his award in the form of a special case, decided in favour of the shipowners, the present appellants, that it had been determined. Atkin J., before whom the special case was argued, took the opposite view. In the special case the arbitrator sets out the facts and the contentions of the parties, and he states what his decision is, but

(1) [1912] A. C. 12.

he does not state the grounds of his decision, or whether he draws any particular inference of fact from the facts stated. No application was made to this Court that the case should be remitted to the arbitrator, and from this I assume that the parties desire that the proper inference to be drawn from the facts should be treated as a question of law and dealt with accordingly. The material facts can be quite shortly stated. The charterparty is dated May 18, 1912, at which time the *F. A. Tamplin* was in course of building. She was constructed as a tank steamer designed to carry cargoes of oil in bulk. The charter was for the long period of sixty calendar months from the day at which the vessel was placed at the disposal of the charterers. This period does not expire till December 4, 1917. The charterparty is not a demise of the ship, but it places the ship at the disposal of the charterers for the purposes, and with the limitations, indicated in the charterparty. These may be briefly stated as follows. The vessel was to be employed in such lawful trades for voyages between any safe port or ports in the United Kingdom and/or Continent of Europe and/or any safe port or ports in the United States of America and/or Mexico and/or North and South America and/or Africa and/or Asia and/or Australia and back finally to a coal port in the United Kingdom for the carriage of refined petroleum and/or crude oil and/or its products as the charterers should direct, but warranted no B. N. A. on Atlantic except for coaling: warranted no Baltic between October 1 and April 1; warranted no White Sea between October 1 and April 1. Though this class of trading was the one which was mainly in the contemplation of the parties, the charterers had the right to ship other suitable cargo to a certain extent; and had also the right to sub-let the vessel on Admiralty or other service, but without prejudice to the charterparty. One of the express conditions of the charterparty was that no voyage should be undertaken, or goods or cargoes loaded, that would involve risk of seizure, capture, or penalty by British or foreign rulers or Governments. The charterparty also contained an exception clause which included "restraint of princes." The hire payable was at the rate of 1750*l.* sterling per calendar month. The owners had to provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew. The captain, though appointed by the owners,

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was to be under the orders and direction of the charterers. On February 15 of this year the Government requisitioned the vessel for the purpose of carrying troops, and they caused certain alterations to be made in order to adapt her for that purpose. The Government also required certain members of the crew who were foreigners to be replaced by Englishmen, and this appears to have been done or assented to by the owners. No serious question was raised by the appellants in relation to this dealing with the crew. The respondents appear to receive from the Government a substantially increased hire over and beyond what they pay to the appellants, and they not unnaturally claim to be entitled to receive this and retain it, as they were not allowed to retain the vessel for their own trade, which they were anxious to do. The shipowners contend that in the events which have happened the charterparty has been determined, and that they are entitled to withdraw the vessel from the charterers, or in other words to receive the Government hire themselves. There is no doubt that if the charterers had themselves done what the Government have done their action would have constituted such a breach, or a series of breaches, going to the root of the contract as would have entitled the shipowners to rescind the contract and withdraw the ship. That, however, is not the question which has to be decided. In the events which have happened the charterers have done nothing. It is the Government who has stepped in and requisitioned the ship and has caused her to be altered and employed her on work not authorized by the charterparty. What has been done has been done by "restraint of princes" within the meaning of the exception, which is in my opinion an exception in its nature mutual, and of which either party is therefore entitled to the benefit. It is not, I think, contended that what was done by the Government was not a "restraint of princes," but if authority is wanted it will be found, I think, in the recent case of *Sanday & Co.* v. *British and Foreign Marine Insurance Co.* (1)

The real point in the present case is whether what the Government has done has rendered the commercial enterprise entered into by the parties and evidenced by the charterparty impossible. If it has, then each of the parties has the right to say that the contract cannot be carried out and to treat it as at an end: see *Geipel* v.

(1) [1915] 2 K. B. 781.

Smith (1) and *Jackson* v. *Union Marine Insurance Co.* (2); see also *Hudson* v. *Hill.* (3) The arbitrator decided that the contract came to an end as soon as the Government requisitioned the vessel, that is to say, on February 15, 1915, and that is the position now contended for by the appellants. So far as the alterations of the vessel are concerned, I attach no importance to these. If done by the charterers they would no doubt have amounted to serious breaches of contract justifying rescission by the shipowners, but in their nature they did not and do not render the commercial enterprise impossible. At the time they were carried out the charter had about two years and nine months still to run. The vessel can easily be restored to her former condition as a tank steamer, though possibly her value may have been somewhat diminished by what the Government has done. The fact that so long a period of the time for which the vessel was chartered was still unexpired when the vessel was requisitioned by the Government is to my mind an all-important feature in this case, and one which distinguishes it at once from the series of decisions in which the non-fulfilment of some condition precedent has been held to be destructive of the commercial enterprise. This point was referred to in the judgment of Blackburn J. in *Geipel* v. *Smith.* (4) In the present case the commercial enterprise as contemplated by the parties has undoubtedly been interrupted, and seriously interrupted, by the action of the Government. The interruption, however, is of a nature which was contemplated by the parties and provided for by the introduction of the exception relating to restraint of princes. That mere interrruption of a commercial enterprise, though long prolonged, is not necessarily a determination of the contract under which the enterprise was undertaken is shown by the embargo cases, of which I may refer to *Hadley* v. *Clarke* (5) and the other cases cited in the recent judgment of Swinfen Eady L.J. in *Beal* v. *Horlock.* (6) Looking at the commercial enterprise in the present case from the point of view of each of the parties to the contract, as was done by Brett J. in *Hudson* v. *Hill* (3), what is the position? From the point of view of the

(1) (1872) L. R. 7 Q. B. 404, 413, per Blackburn J.

(2) L. R. 10 C. P. 125, 144, 145, per Bramwell B.

(3) (1874) 43 L. J. (C.P.) 273, 279, per Brett J.

(4) L. R. 7 Q. B. 404, 414.

(5) (1799) 8 T. R. 259.

(6) [1915] 3 K. B. 627.

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shipowners the commercial enterprise was mainly the earning of the hire of the vessel. This the shipowners have not lost, as the charterers either have paid or are willing to pay the hire. The obligations of the charterers remain untouched and the rights of the shipowners in reference to any breach of the charterparty by the charterers are undiminished. From the point of view of the charterers the commercial enterprise was the earning of profit by the use of the vessel or by sub-letting her. This the charterers have not lost. It is quite true that the intervening act of the Government has displaced for the time being the control of either party over the vessel, but meanwhile each party is deriving in substance, though not in form, the benefit, or a substantial part of the benefit, which each contemplated getting out of the enterprise, and there is nothing to prevent the charterers resuming control of the vessel and completing the time charter if and when the Government restore the vessel to them.

Under these circumstances the true inference, in my opinion, to be drawn from the facts is that the requisitioning by the Government of the vessel has not destroyed the foundation of the commercial enterprise and has not therefore determined the time charter. The appeal, in my opinion, fails and must be dismissed with costs.

WARRINGTON L.J. The question in this case is whether a time charter the period of which is still unexpired has been determined by the act of the Government in requisitioning the ship as a transport and making certain structural alterations necessary to fit her for that purpose.

The question was referred to arbitration, the owners contending that the charter is determined, the charterers that it is still in force. The arbitrator has made his award in the form of a special case, expressing his own opinion in favour of the owners. This view has been overruled by Atkin J., and the owners appeal.

The charter is dated May 18, 1912. By it the owners agreed to let and the charterers agreed to hire the ship in question, described as a tank steamer then building, for sixty months commencing from the day on which she should be placed at the disposal of the charterers—this day was in fact December 5, 1912—to be employed in lawful trades for voyages between the ports specified for the carriage of refined petroleum and/or crude oil and/or its products,

warranted no B. N. A. on Atlantic except for coaling, and warranted no Baltic and no White Sea between certain dates, as the charterers or their agents should direct, on the conditions specified. It is unnecessary to mention these in detail; it is sufficient to say that the only direct obligation on the part of the charterers was to pay the freight, a fixed sum of 1750*l.* per month. The other conditions either imposed obligations on the owners or regulated the extent of the charterers' right to the services of the ship. They allowed under certain restrictions the carriage of other cargo than oil; they gave power to underlet without prejudice to the charterparty, and they contained an exception of (amongst other things) restraints of princes, rulers, and people.

The steamer was originally requisitioned by the Admiralty in December, 1914, and was for some time employed in carrying water. In February, 1915, on arriving at Cardiff she was ordered by the Admiralty to Liverpool, where she was altered to fit her for the transport of troops. On March 30, 1915, she left Liverpool on Government service, and she is still employed thereon. The term of the charter expires on December 4, 1917. The charterers have paid and are willing to continue to pay the freight of 1750*l.* a month.

The charterparty was plainly not a demise of the ship; its true effect appears to me to be to entitle the charterers during the specified term to enjoy the use of the ship for the particular purposes and the benefit of the specified services to be performed by the owners, the charterers being under an obligation to pay the agreed freight whether they actually used the ship or not. The effect of the action of the Government is to deprive them for the time being of the actual services of the ship. They contend that they are nevertheless entitled to treat the contract as subsisting; it is the owners who insist that it is not.

It was contended before the learned judge and before us that the contract was subject to the implied condition that the ship should at all times be and remain a tank steamer and that the alterations had occasioned the non-fulfilment of that condition. I can only say as to this that I agree with Atkin J. that there is no ground for implying such a condition.

It was further contended before us that the mercantile adventure at first contemplated by both parties was entirely frustrated by the

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events which have happened, and that therefore the contract is determined and cannot be enforced by either party, reliance being placed on the judgment of Bramwell B., speaking for the majority of the Court, in *Jackson* v. *Union Marine Insurance Co.* (1) But in order to determine what is the mercantile adventure contemplated it must be looked at from the point of view of both parties to the contract: see per Brett J. in *Hudson* v. *Hill.* (2) In the present case the adventure on the part of the owners was that the ship should earn the freight for the entire term of the charter; that of the charterers that they should have the use of the ship. The adventure on the part of the owners has not been frustrated, and it cannot therefore be said that the entire adventure has been frustrated. *Jackson's Case* (1) is plainly distinguishable on the ground that in that case the Court held that the commercial adventure, a single voyage, had wholly failed.

It is true that the action of the Government has imposed upon the owners obligations as to the equipment, voyages, and use of the ship during its present employment different to and more onerous than those imposed by the charter; this circumstance may give them a claim to the generous consideration of the Government, but does not in my opinion enable them to say that as between themselves and the charterers the object of this long time charter is entirely defeated.

So far I have said nothing about the exception of "restraints of princes," and I should have been of the same opinion had it been absent. But if, as at present advised I think is the case, the event which has happened is within the meaning of that expression, the exception assists the view I have expressed above, inasmuch as it shows that the event was one contemplated by the parties in the inception of the contract.

For these reasons I am of opinion that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for owners: *Holman, Birdwood & Co.*

Solicitors for charterers: *Thomas Cooper & Co.*

(1) L. R. 10 C. P. 125. (2) 43 L. J. (C.P.) 273, 279.

G. A. S.

[IN THE COURT OF APPEAL.]

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Sale of Goods—C.i.f. Contract—Payment against Tender of Shipping Documents—Outbreak of War while Contract still executory—Effect of War on Contract—Whether Buyer bound to accept Documents.

At the date of the tender to the buyers of shipping documents under c.i.f. contracts those documents must be valid and effective.

Two c.i.f. contracts for the sale of beans to be shipped from Chinese ports to Naples and Rotterdam respectively each contained a provision that payment was to be in net cash in London on arrival of the goods at port of discharge in exchange for bills of lading and policies of insurance, but payment was to be made in no case later than three months from date of bills of lading or upon the posting of the vessel at Lloyd's as a total loss. The beans were shipped in July, 1914, on German vessels which on the outbreak of war between England and Germany on August 4, 1914, entered ports of refuge in the East, where they remained. At the expiration of three months from the date of the bills of lading the sellers tendered to the buyers the shipping documents, in one case a German bill of lading and an English policy of insurance, and in the other a German bill of lading and a German policy of insurance. The buyers in each case refused to accept the tender and pay the price :—

Held, affirming the decision of Scrutton J. [1915] 2 K. B. 379, that the buyers were entitled to refuse the tender, inasmuch as at the date of tender the documents had, by considerations of public policy, become void and unenforceable as regards any obligations of performance after the outbreak of war, and to carry out their original obligations would involve entering into contractual relations with the King's enemies.

Opinion of Scrutton J. that a c.i.f. sale is not a sale of goods, but a sale of documents relating to goods, disapproved of by Bankes L.J. and Warrington L.J.

APPEAL from a decision of Scrutton J. (1)

Two awards stated by arbitrators in the form of special cases.

The following statement of facts is taken from the judgment of Scrutton J. :—"The contract in each case is the London Corn Trade Association form for Chinese and Manchurian cereals.

(1) [1915] 2 K. B. 379.

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Under it there is sold a quantity of grain, with a liberty to vary it within limits, to be shipped at a time specified, and place specified, at a price specified, with allowance for foreign substances to be ascertained at the port of discharge. The price is to include freight as per bill of lading and insurance; payment net cash in London on arrival of the goods at port of discharge in exchange for bill of lading and policies of insurance (free of war risk) on Lloyd's conditions and including the London Corn Trade Association's f.p.a. clause effected with approved underwriters, for whose solvency seller is not to be responsible; but payment to be made in no case later than three months from date of bill of lading, or upon the posting of the vessel at Lloyd's as a total loss. In the event of war sellers are empowered to cover war risk for, and at the expense of, the buyer, if buyer does not himself insure. All average to be for sellers' account. Any deficiency on bill of lading weight to be paid for by seller, and any excess over bill of lading weight to be paid for by buyer at contract price. Should shipment be prevented by hostilities this contract or any unfulfilled part to be cancelled. Provisional invoice to be tendered within thirty days from the date of the bill of lading, unless the mail is late. But as payment was to be on arrival of goods the tender of documents and requisition of payment could not in ordinary course take place at the date of the original invoice.

"This appears to be a c.i.f. contract with the variation that the price is ultimately payable only on quantity delivered, unless the vessel is posted as lost, or three months have elapsed from date of bill of lading, in which case payment is made on bill of lading weight.

"The facts of the particular cases were as follows:

"ARNHOLD KARBERG & Co. (Sellers) *v.* BLYTHE, GREEN, JOURDAIN & Co. (Buyers).

"The sellers, found to be a firm carrying on business in England, sold to the buyers, who were also an English firm, on the contract form already set out, in May, 1914, a quantity of horse beans to be shipped from China to Naples. In July the sellers shipped beans in accordance with the contract on the German steamer *Gernis* for conveyance to Naples, the bills of lading being dated

July 6 and 11 respectively. At the end of July the buyers insured part of the cargo against war risk; part, neither buyers nor sellers were able so to insure. A declaration of part numbered 835 was apparently made on July 29, and a provisional invoice sent in on the same day; the receipt of this declaration was confirmed by the buyers on August 13. A declaration of the other part, numbered 871, was made on August 1, the provisional invoice sent in on August 12, and the receipt of this declaration was confirmed by the buyers on August 13. On October 11 the German bill of lading and an English policy were tendered to the buyers, who refused to pay. The *Gernis* was in a port of refuge in the Dutch East Indies, and is probably there still. The matter went to arbitration and the arbitrators stated a special case on the question whether the sellers were entitled to payment against such documents at the expiration of three months from the date of the bill of lading."

If the Court should answer that question in the affirmative, the buyers were to pay to the sellers the sum of 1022*l.* 18*s.* 11*d.* together with interest and the costs of the arbitration and award and special case; if the Court should answer the question in the negative, the sellers were to pay the costs of the reference and award. The arbitrators further awarded that the costs of the argument of the special case should be paid by the buyers if the question should be answered by the Court in the affirmative, and by the sellers if the question was answered in the negative.

"THEODOR SCHNEIDER & Co. (Sellers) *v.*
BURGETT & NEWSAM (Buyers).

"In April, 1914, the sellers sold to the buyers, both being English firms, on the contract form already set out, a quantity of horse beans for shipment from China to a range of European ports. In July the sellers shipped beans in accordance with the contract by the German steamer *Camilla Rickmers* from Shanghai to Rotterdam, the bill of lading being dated July 21. Apparently no war insurances were effected. On August 24 the sellers sent a declaration of shipment by the *Camilla Rickmers* to the buyers, who acknowledged receipt. I was not told the date of the provisional invoice. On October 21, the sellers tendered to the buyers a German bill of lading and a German policy. The buyers refused

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to pay. The *Camilla Rickmers* was, and probably is still, in a port of refuge in the Philippines. The matter went to arbitration; the arbitrators decided that the documents were a good tender, but stated their award in the form of a special case that the opinion of the Court might be taken on the point.

"The only differences between the cases were that in the first case the policy was English, in the second German; and that in the first case two declarations and one provisional invoice were before the outbreak of war, and in the second case neither declaration nor provisional invoice was before the outbreak of war. In each case the acknowledgment of receipt or confirmation of the declaration was after the outbreak of war."

Scrutton J. held that the buyers were entitled to refuse the tenders, inasmuch as at the date of the tenders the documents had, by considerations of public policy, become void and unenforceable as regards any obligations of performance after the outbreak of war, and to carry out their original obligations would involve entering into contractual relations with the King's enemies. His Lordship was of opinion that a c.i.f. sale was not a sale of goods, but a sale of documents relating to goods.

The sellers appealed.

George Wallace, *K.C.*, and *Stuart Bevan*, for the appellants Arnhold Karberg & Co. (sellers). The sellers under a c.i.f. contract are not concerned with the validity of the bill of lading at the time of delivery. Having done all that they were bound to do, they were entitled under the contract to payment three months after the date of the bill of lading. Scrutton J. decided in favour of the appellants except as to the effect of the war upon the validity of the bill of lading. Having regard to the provisions for insurance the goods were at the risk of the buyers. The sellers were not bound to insure against war risks. At the time of shipment and thenceforward the goods were at the risk of the buyers. There was nothing to prevent the parties from contracting that the property in the goods should pass at once although there might be no separation. Here the parties did so contract. They were dealing with reference to parcels in a steamer, and as soon as the sellers made a shipment their rights were fixed.

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[SWINFEN EADY L.J. Is not the only question whether the tender of the German bill of lading is a good tender?]

Yes: *Duncan, Fox & Co.* v. *Schrempft & Bonke.* (1) The whole of the war risks are on the buyer: *Groom* v. *Barber* (2); *Sanday & Co.* v. *British and Foreign Marine Insurance Co.* (3) The seller does not warrant the validity or effect of his documents. If they become invalid or inoperative in consequence of the outbreak of war, that is the buyer's risk.

[BANKES L.J. Apart from war risks, the seller is at the risk of having to tender an enemy bill of lading.]

Payment must be made against delivery of the shipping documents whether they are good and valid or not: *Biddell Brothers* v. *E. Clemens Horst Co.* (4)

[BANKES L.J. The buyers cannot be bound to pay upon a document which the law will not recognize.]

The fact that the effect of the war is to put it out of their power to get the goods is a war risk which falls upon them: *Groom* v. *Barber.* (2) This contract did not necessarily involve trading with the enemy so as to be dissolved under *Esposito* v. *Bowden.* (5)

War risks are provided for in the form of policy settled by Lloyd's: Arnould on Marine Insurance, 9th ed., vol. 1, p. 18. They always fall on the buyer. The seller can ask the buyer to insure against war risks. The seller is not bound on a c.i.f. contract to deliver the actual goods; it is enough if he delivers the documents: *Parker* v. *Schuller.* (6) The documents against which the buyer promised to pay were the original documents which the seller had contracted to obtain. The buyer cannot impose on the seller a guarantee that the documents shall continue to be effective.

R. A. Wright, for the appellants Theodor Schneider & Co. (sellers). The sellers performed their contract and are entitled to be paid; they obtained the necessary documents and delivered them in due course. If the documents were good in their inception the sellers had performed their part of the contract: *Landauer &*

(1) [1915] 3 K. B. 355.
(2) [1915] 1 K. B. 316.
(3) [1915] 2 K. B. 781.
(4) [1911] 1 K. B. 934; [1912] A. C. 18.
(5) (1857) 7 E. & B. 763, 784.
(6) (1901) 17 Times L. R. 299.

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Co. v. *Craven & Speeding Brothers* (1); and it was immaterial whether it became void or not. A c.i.f. contract is a contract for the sale of goods, not for the sale of documents, and the sellers had done their part: *Tregelles* v. *Sewell.* (2) It is not necessary to consider when the property in the goods passed. The contract of affreightment can be put an end to in many ways—for instance, if the ship be disabled: *Shipton* v. *Thornton.* (3) There is no distinction between such cases and the outbreak of war. How or when the contract is put an end to is immaterial, for the right of action remains.

The contract comes to an end because it cannot be carried out. It is an implied term of every contract that it comes to an end if it becomes illegal or impossible to perform. In both the present cases the contract has come to an end and cannot be enforced: *Taylor* v. *Caldwell* (4); *Janson* v. *Driefontein Consolidated Mines.* (5) It has never been held that the dissolution of a partly performed contract such as this destroys rights which have already vested: *Ionides* v. *Universal Marine Insurance Co.* (6) There is nothing here to impose any unusual burden on the sellers; there is no obligation on them to procure a fresh shipment. The bill of lading referred to in the contract is the one obtained at the date of shipment: *Crozier, Stephens & Co.* v. *Auerbach.* (7) Here the buyers cannot make terms with the shipowner, for he is an enemy; so they must keep this document and wait till the end of the war to assert their rights, or proceed under the Board of Trade licence of September 25, 1914. But they are bound to accept the tender: *Sanders Brothers* v. *Maclean & Co.* (8) Taking these bills of lading would not have involved the buyers in illegal contracts, for they had ceased to be operative and were only documents of title. They were not, however, wastepaper, for rights arose under them at first. Sellers do not guarantee that the contract will continue valid until the goods have reached the port of delivery.

Maurice Hill, K.C., and *Hon. M. M. Macnaghten*, for Blythe, Green, Jourdain & Co. (buyers). The property in the goods did

(1) [1912] 2 K. B. 94.
(2) (1862) 7 H. & N. 574.
(3) (1838) 9 Ad. & E. 314.
(4) (1863) 3 B. & S. 826.
(5) [1902] A. C. 484.
(6) (1863) 14 C. B. (N.S.) 259.
(7) [1908] 2 K. B. 161.
(8) (1883) 11 Q. B. D. 327.

not pass to the buyers until the documents were produced to them: *Biddell Brothers* v. *E. Clemens Horst Co.* (1); *Ryan* v. *Ridley & Co.* (2) But the point is not material in this case, which concerns a contract for the sale of goods which is to be completed by the delivery of the documents: *In re Shipton, Anderson & Co. and Harrison Brothers & Co.'s Arbitration.* (3) The bills of lading in exchange for which payment is due mean valid and enforceable contracts at the time of tender, documents which will entitle the buyers, if the goods are in existence, to receive them from the ship, or, if lost by the negligence of the shipowner, to sue him. Here the bills of lading were not at the time of tender valid and enforceable contracts; they had become on the outbreak of war contracts which it was illegal for the holders to enforce by English law. The effect of war is to dissolve contracts so far as they are executory and to absolve both parties from further performance. A licence from the Crown cannot revive a contract thus dissolved: *Esposito* v. *Bowden.* (4) The decisions in *Sanday & Co.* v. *British and Foreign Marine Insurance Co.* (5), *Becker, Gray & Co.* v. *London Assurance Corporation* (6), and *Miller* v. *Law Accident Insurance Co.* (7) turned on restraint of princes and do not affect this question.

W. Norman Raeburn, for Burgett & Newsam (buyers), adopted the argument advanced on behalf of Blythe, Green, Jourdain & Co., and added: It is admitted by the appellants that the contracts came to an end, and it follows from that that the documents became mere scraps of paper. The appellants can only perform the contract by delivering valid papers: *Groom* v. *Barber.* (8)

Stuart Bevan in reply. This is a question of the construction of the contract: Benjamin on Sale, 5th ed., p. 405; *Fragano* v. *Long.* (9) There is no authority to the effect that in such circumstances the seller is not entitled to tender the bill of lading and the policy and receive payment. The date with reference to which the nature of the documents has to be considered is the date of the contract, not the date of the tender.

(1) [1911] 1 K. B. 934, 956.
(2) (1902) 8 Com. Cas. 105.
(3) [1915] 3 K. B. 676.
(4) 7 E. & B. 763.
(5) [1915] 2 K. B. 781.
(6) [1915] 3 K. B. 410.
(7) [1903] 1 K. B. 712.
(8) [1915] 1 K. B. 316, 324.
(9) (1825) 4 B. & C. 219.

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R. A. Wright, in reply, referred to *Esposito* v. *Bowden* (1) and *Janson* v. *Driefontein Consolidated Mines.* (2)

SWINFEN EADY L.J. stated the facts and proceeded: The contest between the parties in the first case is this. The sellers insist that, first, according to the true construction of the particular contract with which we have to deal, the contract of May, 1914, the buyers took upon themselves all risks of what might happen in the event of an outbreak of war. That is, if the effect of the outbreak of war was to terminate the contract of affreightment, it was at buyers' risk; if the contract of insurance should be with a foreign underwriter, it was at buyers' risk whether it was valid or not. The argument is that, according to the true construction of the clause, war and any consequences of war were at buyers' risk, and it was the duty of the buyers to take up and pay for the documents when tendered because the events that have happened consequent upon the war were at their risk. That is their first point, and it is dependent entirely upon the true construction of this particular contract. Their second point is of more general importance because it is independent of the construction of the particular contract; their second point is that in contracts c.i.f. all that the seller has to do is to ship goods in accordance with the contract, obtain proper bills of lading, effect proper insurances pursuant to the contract, and having done that, having once acquired documents that are proper and in order, thenceforward those documents are at the risk of buyers, and buyers must pay against tender of those documents; and if before tender on the happening of any event those shipping documents become inoperative in any way, that is at buyers' risk; and they say that that is the ordinary consequence of a c.i.f. contract quite irrespective of the particular terms of this individual contract. Those are the two points that arise for discussion.

Before construing the clause upon which the first point turns, beginning "in the event of war," it will be observed that the previous clause providing for payment provides for the nature of the insurance which sellers are to effect. This is the insurance which is part of the terms of the contract included in the price: "in

(1) 7 E. & B. 763, 787. (2) [1902] A. C. 484, 499.

exchange for . . . . policies of insurance (free of war risks) on Lloyd's conditions, ... effected with approved underwriters, for whose solvency seller is not to be responsible." That means that the insurance for which the sellers are to pay, and which is included in the lump sum price, is to be an insurance on ordinary Lloyd's conditions, but with a warranty free of capture and seizure. Those words, "free of war risk," mean that it will be a sufficient compliance with this provision as to insurance if the sellers effect a policy in the ordinary Lloyd's form, the capture and seizure being an excepted peril; that is as if the policy contained the warranty in the usual settled form: "Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat (piracy excepted), and also free from all consequences of hostilities or warlike operations, whether before or after declaration of war." In my opinion that is the meaning of the phrase there, "free of war risk." That throws light upon what follows, because the next clause is in my opinion directed solely to the excepted perils. "In the event of war should sellers not have received from buyers approved underwriters' policies" and so on "for approximate invoice amount covering war risk"—now that means covering the risk that is excepted in the previous insurance—"sellers shall have the right, if they think fit, and are able, to cover war risk for account and risk of buyers." That means that on the happening of that event it is open to the sellers, (who themselves of course would run some risk in the matter because their buyer may not be in a position to accept and take up the shipping documents,) to protect themselves by effecting an insurance against war risk at the cost of the buyer. Then: "If war risk is incurred during time of shipment sellers are empowered to insure same at the buyer's cost, if the latter fails to do so." In my opinion the true construction of this clause, upon which so much reliance is placed by the appellants, is this: that it provides only for the war risk, that it is an excepted peril from the previous insurance, and that it provides that sellers may effect that insurance at the cost of buyers; but it has no further or other effect, and it does not, as the appellants contend, extend to throwing the risk of all consequences of the war and what may happen to any of the documents upon the buyers. In my opinion that point made by the appellants fails.

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Then the larger and wider point remains, as to whether, quite apart from the special terms of the contract, it is sufficient for sellers, having once obtained documents which were valid shipping documents at the time when they were obtained, to tender those documents at the proper time and insist upon payment of the price. I say "to tender them at the proper time," but in my opinion no question arises here as to what is the proper time, because by the terms of the contract the time is provided for. Payment is to be made net cash in London, that is payment against shipping documents, first, on arrival of the goods at the port of discharge (and that event has not happened); or upon the posting of the vessel at Lloyd's as a total loss (and that has not happened); and then "in no case later than three months from the date of the bill of lading" or bills of lading. As the bills of lading are dated July 6 and 11, the three months would expire on October 11, and that was the date at which, according to the contract, if everything else had been in order, the sellers were entitled to tender the documents and ask for payment; so that no question arises with regard to the proper date at which the sellers were entitled to require payment.

The point is upon whom the loss is to fall where documents which were originally valid have become invalid before they were tendered. In my opinion, although there is no direct authority on the point, the decisions which have been given as to the effect of c.i.f. contracts, and the language which is used in those cases, make it reasonably clear what the obligation of the seller is. In *Ireland* v. *Livingston* (1) Lord Blackburn—Blackburn J. as he then was—in giving his opinion to the House of Lords put it in this way: "The terms at a price, 'to cover cost, freight, and insurance, payment by acceptance on receiving shipping documents,' are very usual, and are perfectly well understood in practice." Then, after dealing with certain details which I need not read, he says: "Should the ship arrive with the goods on board he will have to pay the freight, which will make up the amount he has engaged to pay. Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy. If the

(1) (1872) L. R. 5 H. L. 395, 406.

non-delivery is in consequence of some misconduct on the part of the master or mariners, not covered by the policy, he will recover it from the shipowner. In substance, therefore, the consignee pays, though in a different manner, the same price as if the goods had been bought and shipped to him in the ordinary way." He points out that as a consequence of non-delivery through some misconduct of the master or mariners not covered by the policy there would be a right of action in the purchaser against the shipowner. In considering what the actual position of the parties here was, there can be no doubt that the effect of the war upon the bill of lading was this, that as from the outbreak of war the contract with the German shipowner became dissolved. In the case of *Esposito* v. *Bowden* (1) the point was expressly dealt with. In that case Willes J., in giving judgment in the Exchequer Chamber, said: "As to the mode of operation of war upon contracts of affreightment, made before, but which remain unexecuted at, the time it is declared, and of which it makes the further execution unlawful or impossible, the authorities establish that the effect is to dissolve the contract, and to absolve both parties from further performance of it." So that the effect was that as from the outbreak of war the owner of the German ship *Gernis* was absolved from the further performance of the contract evidenced by the bill of lading to carry the goods in question from Hankow to Naples. When he had put into the port in the Dutch East Indies he was under no further continuing liability to proceed with the voyage to Naples. The buyer would not obtain by delivery of the shipping documents to him a valid contract or undertaking to carry goods to Naples; that contract was at an end. Then Willes J. proceeds (2): "Lord Tenterden also, in his work on Shipping, states the law thus: 'Another general rule of law furnishes a dissolution of these contracts' (that is, for the carriage of goods in merchant ships) 'by matter extrinsic. If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the Government of the country, the agreement is absolutely dissolved. If, therefore, before the commencement of a voyage, war or hostilities should take place between the State to which the

(1) 7 E. & B. 763, 783. (2) 7 E. & B. 784.

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ship or cargo belongs, and that to which they are destined, or commerce between them be wholly prohibited, the contract for conveyance is at an end, the merchant must unlade his goods, and the owners find another employment for their ship. And probably the same principles would apply to the same events happening after the commencement and before the completion of the voyage.' " A little later on he says (1): " The argument which was again urged in this case, that, apart from any considerations affecting the shipowner only, the defence was valid by reason of the law also forbidding the charterer to load a cargo, and, as a consequence of that prohibition, dissolving the charter party and absolving both parties from further performance, remains to be considered." Then in the case of *Janson* v. *Driefontein Consolidated Mines* (2) Lord Lindley said: " War produces a state of things giving rise to well-known special rules. It prohibits all trading with the enemy except with the Royal licence, and dissolves all contracts which involve such trading." Therefore the effect of the war was that at the time of the tender there was no subsisting contract for the carriage of the goods to Naples, and no subsisting contract upon which the buyer would have been able to maintain an action, seeing that the shipowner was a German subject.

In my opinion the cases dealing with c.i.f. contracts have all proceeded upon the footing that upon delivery of the shipping documents the purchaser will obtain a right either to the goods or, if the goods are lost or damaged, to such claims in respect of the goods as the shipping documents may entitle him, not necessarily covering every loss or damage, but they were to be effective documents; and I think that the language used by the judges in dealing with c.i.f. contracts is only consistent with the view that the documents tendered are to be effective shipping documents, and that where the bill of lading has become avoided by war it is not a sufficient compliance with the contract to tender it. For instance, in *Biddell Brothers* v. *E. Clemens Horst Co.* (3), it was put in this way by Kennedy L.J., whose judgment was approved in the House of Lords: " But the vendor, in the absence of special agreement, is not yet in a position to demand payment from the

(1) 7 E. & B. 787. (2) [1902] A. C. 484, 509.
(3) [1911] 1 K. B. 934, 956.

purchaser; his delivery of the goods to the carrier is, according to the express terms of s. 32,"—that is of the Sale of Goods Act—" only 'prima facie deemed to be a delivery of the goods to the buyer'; and under s. 28 of the Sale of Goods Act, as under the common law (an exposition of which will be found in the judgments of the members of the Exchequer Chamber in the old case of *Startup* v. *Macdonald* (1)), a tender of delivery entitling the vendor to payment of the price must, in the absence of contractual stipulation to the contrary, be a tender of possession." Now how could the indorsement and delivery of a bill of lading which has become ineffective, and which is at an end as evidencing a contract of affreightment, be a tender of possession? Then the learned judge proceeds: "How is such a tender to be made of goods afloat under a c.i.f. contract? By tender of the bill of lading, accompanied in case the goods have been lost in transit by the policy of insurance. The bill of lading in law and in fact represents the goods. Possession of the bill of lading places the goods at the disposal of the purchaser." He is dealing there obviously with a bill of lading which in law and in fact does represent the goods. That is not so in this case. He says "Possession of the bill of lading places the goods at the disposal of the purchaser." It does not do so in this case; the goods here are in the hands of the German shipowner. Then a little later he cites with approval a well-known passage from Bowen L.J.'s judgment in *Sanders Brothers* v. *Maclean & Co.* (2), where Bowen L.J. said: "And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to some one rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be." How can that language be applied to a bill of lading which has ceased to be effective, and where the contract evidenced by it has become dissolved? How does it carry with it all rights created by the contract of carriage between the shipper

(1) (1843) 6 Man. & G. 593. (2) 11 Q. B. D. 327, 341.

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and the shipowner ? The contract is at an end ; the contract itself is dissolved. In my opinion the language used in dealing with these c.i.f. contracts points to the fact that at the date of the tender the documents must be valid and effective documents.

In addition there is this further point, that the effect of requiring the buyer to accept the bill of lading in the present case might involve his entering into a contract with an alien enemy and having to make payments to an alien enemy. If the indorsement of the bill of lading were effective under the circumstances to make a valid transfer, it might make the buyer directly liable to the German owner for freight payable under the bill of lading. A further point was urged. It was said that at all events no trading with the enemy not permitted by the Proclamation would exist in the present case having regard to the terms of the Proclamation of September 25. I do not think that that touches the point. That Proclamation of September 25 merely enables the owners of cargoes then lying in a neutral port in a ship owned by the enemy to pay the freight and other charges to the agent of the shipowner at that port to obtain possession of the cargo. In other words, the then holders of the bill of lading at the time of this Proclamation—the shippers in this case—could have availed themselves of this Proclamation to obtain delivery of the cargo at the port in the Dutch East Indies, where the vessel was, by paying whatever charges had to be paid to obtain possession of the cargo without incurring the penalties of trading with the enemy. That is the only effect of that Proclamation.

In my opinion the judgment below was right that the documents were not such documents as the sellers were bound to tender to obtain payment of the price ; they had become ineffective, and the buyers were entitled to refuse to pay against them.

In the second case there is little difference ; certainly there is no difference in favour of the appellants—the difference is the other way. The cargoes are similar, but the dates are a little different. In the second case the ship, the *Camilla Rickmers*, took refuge in the port of Manila, but the main difference is that in that case there is an additional objection to the appellants succeeding, because the policy of insurance was effected with German underwriters, so that not only was there a German bill of lading which was avoided

by the war, but a German policy of insurance, which was also avoided by the war, and at the date of the tender the contracts evidenced by both of those documents were dissolved, and they were not subsisting contracts at the date of the tender.

For these reasons I am of opinion that the judgment below was right, as the buyers were not bound to pay against the documents, and that it ought to be affirmed.

BANKES L.J. We have had in this case a very full and interesting discussion on the question of the effect of the outbreak of war upon certain c.i.f. contracts entered into before the outbreak of war. I need not refer to the facts of the cases which have been dealt with by Swinfen Eady L.J. In my opinion the answer to the question which the Court has to decide is to be found on the face of the contracts, and upon consideration of what the terms of those contracts provide. The contract on the part of the sellers is a contract for the sale of goods whereby the sellers also undertake, inter alia, to enter into a contract of affreightment to the appointed destination, which contract will be evidenced by the bill of lading, and secondly to take out a policy or policies of insurance upon the terms current in the trade, but which policy or policies were not in this case to include war risks. On the buyers' part they undertook to pay net cash in London in exchange for the bill or bills of lading and policies of insurance, either on arrival of the goods at the port of discharge, or at the expiration of three months from the date of the bills of lading should the goods not sooner arrive, or on the posting of the vessel at Lloyd's as a total loss. In any case, however, the payment is to be in exchange for the bill or bills of lading and policy or policies of insurance. What is the meaning of the buyer's contract thus expressed, that he is to pay in exchange for a bill of lading? In my opinion it means what it says, that in exchange for the price he is to receive a bill of lading which is still a subsisting contract of affreightment of the goods to the port of destination, and a policy or policies of insurance which is, or are still, a subsisting contract, or subsisting contracts, of insurance. It is said that this construction, which seems to me so obviously the natural construction, ignores the fact that in a contract of this kind certain risks fall upon the buyer. I quite accept the contention that certain risks do fall

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upon the buyer. For instance, in the present cases all war risks fell on the buyer, as the parties have agreed that the seller shall be under no obligation to obtain policies covering war risks. I agree also that the condition of the goods at the time of the tender of the shipping documents is not material, nor is the value of the documents at the time of tender material. In all such matters the risk is on the buyer. He may be obliged to pay for goods although they may be at the bottom of the sea, or although through some unforeseen circumstance they may never arrive, or although they may have been lost owing to some cause not covered by the agreed form of policy. All these risks, however, are risks affecting the goods. In effect the contention of the appellants appears to me to be a contention that one of the risks undertaken by the buyer is a risk affecting his contract, and not the goods the subject-matter of the contract. I cannot agree with this view. It appears to me that the question of the construction of the contract must depend upon the language used, and not upon any such considerations as these. In the present case it is not disputed that the outbreak of war dissolved the contract of affreightment, and that so far as any further prosecution of the voyage was concerned the bill of lading was no longer an effective document. Under those circumstances, in my opinion that bill of lading was not a bill of lading within the meaning of the contract in respect of which the seller was under an obligation to pay cash in exchange.

Scrutton J. in his judgment has used one expression with which I do not agree. The expression is the one in which he says that (1) "the key to many of the difficulties arising in c.i.f. contracts is to keep firmly in mind the cardinal distinction that a c.i.f. sale is not a sale of goods, but a sale of documents relating to goods." I am not able to agree with that view of the contract, that it is a sale of documents relating to goods. I prefer to look upon it as a contract for the sale of goods to be performed by the delivery of documents, and what those documents are must depend upon the terms of the contract itself. The conclusion at which Scrutton J. arrives he expresses in this way. He says (2): "It is clearly not essential that if the goods do not arrive, the buyer should have a good claim on one of the contracts,"—I have already dealt with that, and

(1) [1915] 2 K. B. 388. (2) [1915] 2 K. B. 392.

with that I fully agree—" but I think it is essential that each contract should be one into which he can legally enter as a contracting party, and when the legal relations of the seller under the contract of affreightment tendered have become void, and it is illegal for the buyer to enter into any similar relations with shipowner or insurer, I cannot hold that such documents are good tender." He puts there two grounds upon which he bases his decision, and in so far as the first ground depends upon the construction of the contract I entirely agree with him ; but the second ground he bases upon the contention apparently that it was illegal for the buyer to enter into any similar legal relation with the shipowner or the insurer, and upon that point we have had an extremely interesting discussion. Mr. Wright has contended that the taking of the bill of lading by the buyer in this particular case would not have involved him in any illegal contract upon the ground that the bill of lading has ceased to be an operative contract of affreightment, and that the taking of it would not involve the buyer in any legal relations with the shipowner, and that the bill of lading has become merely a document of title in respect of the goods, which may or may not at some future time be capable of enforcement. This contention seems to me to be a very strong ground for arriving at the conclusion that the tender of such a document is not a good tender under the contract. Mr. Wright further contended that it is not true to say that a bill of lading is a piece of wastepaper, because in so far as it covered the period from the time of shipment until the time this vessel took refuge it was an effective document, and some rights may still exist in respect of that period which may be evidenced by this bill of lading. How that may be I am not prepared to say. The contract has come to an end. It has not come to an end in the sense that Mr. Wright refers to where the goods are lost ; it has not come to an end in the sense that although it is a perfectly good and enforceable contract it is valueless ; but it has come to an end in the sense indicated by Willes J. in *Esposito* v. *Bowden*. (1) He says the contract is dissolved, which seems to me to be an entirely different thing and to involve entirely different consequences.

In my opinion this appeal fails, and the judgment of Scrutton J., subject to the point which I have indicated, was correct.

(1) 7 E. & B. 763.

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WARRINGTON L.J. I am of the same opinion, and but for the extreme general importance of the question we have to determine I should have added nothing to what has been said by my learned brethren.

The question arises between the sellers and the buyers of goods under a c.i.f. contract, the question being whether in the events which have happened the sellers are by virtue of the contract entitled to be paid the contractual price for the goods. Scrutton J. has held that they are not so entitled.

The first thing in dealing with a question of such a nature is to ascertain what is the true meaning and effect of the contract. The contract in the present case is an ordinary c.i.f. contract, that is to say, it is a bargain made by sellers of goods abroad for their shipment, for providing for their carriage to the port of destination, and for insuring the goods during the voyage, the buyer having to pay the cost of the goods, the freight, and the cost of the insurance. The provisions in the particular contract with which we have to deal with reference to the payment of the purchase-money are that payment is to be "Net cash in London on arrival of the goods at port of discharge, in exchange for bill or bills of lading and policies of insurance (free of war risk) on Lloyd's conditions . . . . but payment to be made in no case later than three months from date of bill of lading or upon the posting of the vessel at Lloyd's as a total loss." The effect of that provision is that the purchase-money is to be paid in exchange for the shipping documents, to use a short expression, on the happening of the earliest of three events—either the arrival at the port of discharge, or the posting of the vessel at Lloyd's as a total loss, or the expiration of three months from the date of the bill of lading. In the present case the event which happened was the expiration of three months from the date of the bill of lading. On the happening of that event then payment was to be made in exchange for bill or bills of lading and policies of insurance. The sellers—I am dealing at present with A. Karberg & Co.'s action only—tendered a policy of insurance with English underwriters, and so far there is no question; but they tendered a bill of lading signed on behalf of German shipowners, the goods having been laden on board a German ship prior to the outbreak of war, which ship on the outbreak of war, or shortly afterwards, took

refuge in some port of the Dutch East Indies, and of course never arrived at her destination, which was Naples. Now was the tender of the bill of lading under those circumstances sufficient to entitle the seller to receive payment of the goods? It is conceded, and it is undeniable, that the effect of the outbreak of war was to dissolve the contract of affreightment. It is stated in terms in the judgment of Willes J. in *Esposito* v. *Bowden* (1) in this way: "As to the mode of operation of war upon contracts of affreightment, made before, but which remain unexecuted at, the time it is declared, and of which it makes the further execution unlawful or impossible, the authorities establish that the effect is to dissolve the contract, and to absolve both parties from further performance of it." So far there is no question; but it is contended that the tender of a bill of lading which was properly obtained by the seller at the time when it was obtained, notwithstanding that the contract of affreightment which is evidenced by it is dissolved, is a sufficient tender to entitle the seller to the purchase-money. The effect of such a contract, or rather the obligation of the seller under such a contract, is expressed by Hamilton J., as he then was, in *Biddell Brothers* v. *E. Clemens Horst Co.* (2) in the following terms; and this judgment of Hamilton J. was ultimately confirmed by the House of Lords, adopting the minority judgment of Kennedy L.J. in the Court of Appeal. Hamilton J. said this: "A seller under a contract of sale containing such terms"—that is, a c.i.f. contract—"has firstly to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly to make out an invoice as described by Blackburn J. in *Ireland* v. *Livingston* (3) or in some similar form; and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage. Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivery

(1) 7 E. & B. 783. (2) [1911] 1 K. B. 214, 220.
(3) L. R. 5 H. L. 406.

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on board ship at the port of shipment. It follows that against tender of these documents, the bill of lading, invoice, and policy of insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price."

Incidentally I desire to say that I entirely agree with Bankes L.J. in the remarks he has made about the statement made by Scrutton J., that such a contract as this is a contract for the sale of documents. I need not say that it is with much deference that I express my disagreement with a statement of that sort made by a judge with such extensive knowledge of commercial matters as Scrutton J., but it seems to me that it is not in accordance with the facts relating to these contracts. The contracts are contracts for the sale and purchase of goods, but they are contracts which may be performed in the particular manner indicated by that passage from the judgment of Hamilton J. which I have just read; in particular that the delivery of the goods may be effected first by placing them on board ship, and secondly by transferring to the purchaser the shipping documents.

Is the obligation of the seller which he has to fulfil performed by delivering what he has purported to deliver in the present case—a document which does not entitle the buyer to obtain delivery of the goods because the contract of affreightment has ceased to be effective? In my opinion quite plainly not. In order truly to perform his contract he has to deliver documents by virtue of which the buyer may, if the goods are in existence, obtain delivery of them, and by virtue of which, if the shipowner has not fulfilled his obligation imposed by the contract of affreightment, he, the buyer, may have such remedies as the contract of affreightment would give him. Neither of those conditions is fulfilled by the delivery of a document evidencing a contract which has been dissolved by the outbreak of war, and the further performance of which has become impossible.

But then it is said that however that may be in the case of an ordinary c.i.f. contract, one not containing such provisions, it does not apply to the present case because this contains a special provision throwing upon the buyer all risks arising from the outbreak of war. In my opinion that is not the case on the true construction

of this contract. The obligation of the seller is to effect a marine insurance for the ordinary risks, that is to say, excluding war risks. The reference to the further policy against war risks is inserted for the further protection of the seller, so that if he pleases, and if the event falls within the specification in the contract, at the buyer's risk he may further protect himself by effecting a policy against war risks; but that is all. It does not affect in any way the true construction and effect of the contract as to what is the seller's obligation in order effectively to transfer to the buyer the goods if they are in existence, or an effective policy of insurance should the goods be lost by any of the events covered by this policy. In my opinion in *Karberg's Case*, the contract of affreightment not being effective at the time of the tender, the delivery or tender of the bill of lading was not a sufficient tender of a bill of lading to entitle the seller to recover the price of the goods.

In *Schneider's Case*, the second of the two cases, it is unnecessary to add anything, because that case is less favourable to the seller than *Karberg's Case*, inasmuch as not only was the bill of lading a contract with a German, but the policy of insurance was also a contract with a German.

There is only one other point, and that is the point that under the licence of the Board of Trade of September 25, 1914, the buyer was released from any illegality there might otherwise be in any possible dealings he might have with the shipowner. In my opinion that is not the true effect of the Board of Trade licence. The Board of Trade licence in my judgment only effects this, that it enables the owner of the goods, whoever he may be, without infringing the law against trading with the enemy to go to the neutral port where the ships are and there make such bargain as he can with the owner of the ship in which the goods are placed in order to obtain possession of his goods on payment of freight and other necessary charges. But more than that, I think it is established by *Esposito* v. *Bowden* (1), both by the judgment of the Court of Queen's Bench and by the judgment of the Court of Exchequer Chamber, that such a licence of the Board of Trade could not set up again a contract which had become dissolved according

(1) 7 E. & B. 763.

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to the well settled principles of law by the outbreak of the war.

On the whole in my judgment the present appeal ought to be dismissed.

Solicitors: *Coward & Hawksley, Sons & Chance; Armitage, Chapple & Macnaghten; Thomas Cooper & Co.*

H. C. R.

[IN THE COURT OF APPEAL.]

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QUIRK *v.* THOMAS (EXECUTOR OF).

[1913 Q. 2562.]

Marriage—Breach of Promise—Action against Executor of Promisor—Special Damage—Business given up in Consideration of Promise to marry—Survival of Cause of Action—Actio personalis moritur cum persona.

The plaintiff brought an action for breach of promise of marriage against the executor of the promisor in which she claimed as special damage loss suffered by her through having given up a profitable business at the request of the deceased and in consideration of his promise to marry her. The jury having found a verdict for the plaintiff:—

Held, that the plaintiff was not entitled to maintain the action.

By Swinfen Eady and Phillimore L.JJ., Pickford L.J. not expressing a decided opinion: There was no corroboration of the plaintiff's evidence as required by s. 2 of 32 & 33 Vict. c. 68.

By Phillimore and Pickford L.JJ.: Assuming that the action would lie to recover special damage, the loss to the plaintiff by reason of her having given up her business was not special damage flowing from the breach, and was therefore not recoverable.

Semble, per Swinfen Eady, L.J.: An action for breach of promise of marriage will not lie after the death of the promisor to recover special damage.

Judgment of Lush J. [1915] 1 K. B. 798 affirmed.

APPEAL from the judgment of Lush J. on further consideration after the trial of the action with a jury; reported [1915] 1 K. B. 798.

The action was brought to recover damages for breach of promise to marry. After the issue of the writ and before the statement of

claim was delivered the defendant died. The action was continued against his executor, the claim being confined to special damage alleged to have been suffered by the plaintiff. The plaintiff in her statement of claim alleged that in or about the month of May, 1910 (at the trial this date was fixed by the plaintiff as June 6, 1910), the deceased promised to marry her, and asked her to give up the business of a milliner which she was then carrying on at a profit, and the plaintiff in pursuance of this request and in consideration of the deceased's promise to marry her agreed to give up her business; and she gave the same up in consideration of and in reliance upon the promise to marry her. The special damage alleged was the loss of the business and of the time and labour spent in acquiring and developing it, and the income which the plaintiff would have derived from the profits of the business if she had not given it up. At the trial the plaintiff by amendment alleged a promise to marry in or about the month of June or July, 1909, which was repeated in May, 1910.

At the close of the plaintiff's case it was submitted on behalf of the defendant that there was no corroboration of the plaintiff's evidence as required by the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 2. The learned judge held that there was, and the jury found that the deceased promised to marry the plaintiff (*a*) in June or July, 1909, and (*b*) on June 6, 1910; and that the plaintiff suffered special damage through the deceased's breach of promise, 350*l*.

The learned judge on further consideration held that the action did not lie upon the grounds, first, that the action was a personal action and was not maintainable against the executor of the promisor; and, secondly, that the loss sustained by the plaintiff was not special damage flowing from the breach. He accordingly gave judgment for the defendant with costs, the judgment as drawn up stating that "it is adjudged that the plaintiff recover nothing against the defendant, and that the defendant recover against the plaintiff his costs of defence to be taxed."

On a subsequent date the plaintiff applied to the learned judge to amend the judgment by ordering that the defendant should pay to the plaintiff the costs of the issue as to the promise to marry,

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which the jury found in her favour. (1) Lush J. held that this was not a separate "issue" within the meaning of Order LXV., rr. 1, 2, and dismissed the application: see [1915] W. N. 147.

The plaintiff appealed, and the defendant gave notice that upon the hearing of the appeal he would contend that there was no sufficient evidence in corroboration of the plaintiff's evidence.

Waugh, K.C., and *J. D. Crawford* (*Ratto* with them), for the plaintiff. The maxim actio personalis moritur cum persona applies, generally speaking, to actions ex delicto and not to actions of contract: *Hambly* v. *Trott* (2); *Phillips* v. *Homfray* (3); *Pulling* v. *Great Eastern Ry. Co.* (4); *Finlay* v. *Chirney*. (5) "The application of that maxim is limited to actions in which remedy is sought for a tort, or for something which involves, at any rate, the notion of wrong-doing": per Lord Macnaghten in *United Collieries* v. *Simpson*. (6) In *Siboni* v. *Kirkman* (7) Parke B. stated the general rule as to contracts: "Executors are responsible on all the contracts of the testator broken in his lifetime, and there is only one exception with regard to their liability for contracts broken after his death; that is this, that they are not liable in those cases where personal skill or taste is required." In the case of an action for breach of promise of marriage, though it is a case of contract, the general damages are of a purely personal or sentimental character and may be awarded for injury to the wounded feelings and pride of the plaintiff caused by the breach as well as for the loss of the marriage: *Smith* v. *Woodfine* (8); and the fact that the defendant seduced the plaintiff under a promise of marriage may be given in evidence in aggravation of the damages: *Berry* v. *Da Costa* (9); *Millington* v. *Loring*. (10) Where the damages are purely personal they cannot be recovered against the executor of the promisor; but where there is special damage, that is, damage to the estate of the plaintiff, an action to recover that damage will lie against the executor: *Chamberlain* v.

(1) The defendant in his statement of defence did not admit any of the allegations in the statement of claim, and pleaded that the statement of claim disclosed no cause of action.

(2) (1776) 1 Cowp. 371, 375.

(3) (1883) 24 Ch. D. 439, 456.

(4) (1882) 9 Q. B. D. 110.

(5) (1888) 20 Q. B. D. 494, 504.

(6) [1909] A. C. 383, 391.

(7) (1836) 1 M. & W. 418, 423.

(8) (1857) 1 C. B. (N.S.) 660.

(9) (1866) L. R. 1 C. P. 331.

(10) (1880) 6 Q. B. D. 190.

Williamson (1); *Finlay* v. *Chirney*. (2) Where, as here, the plaintiff agreed to give up her business at the request of the deceased and as part of the consideration for the promise to marry and the business was given up, the damage is recoverable: *Finlay* v. *Chirney*. (3) All the members of the Court in that case recognized that there might be special damage arising from a breach of promise to marry which could be recovered in an action against the promisor's executors. The plaintiff has lost the benefit of the marriage and a so the business which she gave up at the request of the deceased. The injury to her estate is the special damage, which, if pleaded, is recoverable. It is not ordinary damage flowing directly from the breach, but it was within the contemplation of both parties at the date of the promise within the doctrine of *Hadley* v. *Baxendale* (4), and is therefore recoverable: *Finlay* v. *Chirney*. (5)

"Special damage" is the particular damage (beyond the general damage) which results from the particular circumstances of the case: *Ratcliffe* v. *Evans*. (6) "'General damages,' as I understand the term, are such as the law will presume to be the direct natural or probable consequence of the act complained of. 'Special damages,' on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character, and, therefore, they must be claimed specially and proved strictly": per Lord Macnaghten in *Ströms Bruks Aktie Bolag* v. *Hutchison*. (7) In *Bradshaw* v. *Lancashire and Yorkshire Ry. Co*. (8) it was held, following *Knights* v. *Quarles* (9) and *Potter* v. *Metropolitan Ry. Co*. (10), that, where a passenger on a railway was injured by an accident and died afterwards, his executrix might recover in an action for breach of contract against the railway company the damage to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business. That shows that part of the cause of action survives, namely, that in respect of the injury to the personal estate. *Bradshaw's Case* (8) was approved by the Court

(1) (1814) 2 M. & S. 408.
(2) 20 Q. B. D. 494.
(3) 20 Q. B. D. 501.
(4) (1854) 9 Ex. 341.
(5) 20 Q. B. D. 507.
(6) [1892] 2 Q. B. 524, 528.
(7) [1905] A. C. 515, 525.
(8) (1875) L. R. 10 C. P. 189.
(9) (1820) 4 Moore, C. P. 532; 2 Brod. & B. 102.
(10) (1874) 32 L. T. 36.

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of Appeal in Ireland in *Daly* v. *Dublin, Wicklow, and Wexford Ry. Co.* (1), by Lord Halsbury in *The Greta Holme* (2), and by Farwell L.J. in *Jackson* v. *Watson & Sons* (3); see also notes to *Ashby* v. *White.* (4) The plaintiff is therefore entitled to judgment for the damages awarded by the jury. [*Harvey* v. *Johnston* (5) was also referred to.]

Next, the learned judge was wrong in refusing to give to the p'aintiff the costs of the issue as to the promise by the deceased man to marry. Upon that issue the plaintiff succeeded. That was an "event" which would have entitled her to judgment but for the application of the maxim actio personalis moritur cum persona. The question whether that maxim applied raised a separate issue within the meaning of Order LXV., r. 2, as explained in *Slatford* v. *Erlebach* (6) and *Howell* v. *Dering.* (7) [*Myers* v. *Defries* (No. 2) (8) was also referred to.]

Barnard Lailey, K.C., and *J. H. Watts*, for the defendant. After the death of either party to a promise to marry no action can be maintained to recover damages for breach of that promise. The action is a personal action within the meaning of the maxim actio personalis moritur cum persona. It is significant that, though the suggestion on which the present action is based, namely, special damage to the estate of the promisee, was first mooted over one hundred years ago in *Chamberlain* v. *Williamson* (9) and has been referred to in subsequent cases, no such claim appears to have been actually made until the present action, though circumstances giving rise to it must have existed in many cases. In the earliest times of English law survival of causes of action was the rare exception, non-survival was the rule: per Bowen L.J. in *Finlay* v. *Chirney* (10); Pollock on Torts, 9th ed., p. 64. The rule is well settled that in personal actions the death of either party puts an end to the cause of action. The line supposed to be drawn between contract and tort does not correspond with early English law, and it was held so late as 1805 that an action of debt did not lie

(1) (1892) 30 L. R. Ir. 514.
(2) [1897] A. C. 596, 601.
(3) [1909] 2 K. B. 193, 203.
(4) (1703) 1 Sm. L. C., 12th ed., 266, 307.
(5) (1848) 6 C. B. 295.
(6) [1912] 3 K. B. 155.
(7) [1915] 1 K. B. 54.
(8) (1880) 5 Ex. D. 180.
(9) 2 M. & S. 408.
(10) 20 Q. B. D. 503.

against an administrator upon a simple contract of his intestate: *Barry* v. *Robinson.* (1) *Chamberlain* v. *Williamson* (2) and *Finlay* v. *Chirney* (3) show that even in later times the rule of non-survival is not confined to cases of tort. Where the personal element is present to a dominating extent the maxim applies even though the case be one of contract. A tort is in its nature personal to both parties. A contract may or may not be; usually it is not. "The true test is whether the cause of action itself is one which affects property": per Lord Esher M.R. in *Finlay* v. *Chirney.* (4) *James* v. *Morgan* (5) is an instance of a cause of action arising on a contract not surviving to the administrator of the promisee. It is difficult to conceive an obligation more purely personal in its nature than that arising out of a promise to marry. The personal element is the dominating one, and the action does not survive though there may be some incidental injury to property. The cause of action is one and indivisible. This is so in the case of tort: *Pulling* v. *Great Eastern Ry. Co.* (6); *Hodgson* v. *Sidney.* (7) It is true that in cases of tort an action will lie against executors where the deceased's estate has derived a benefit from the tort, or by executors where there has been injury to the deceased's estate: *Hambly* v. *Trott* (8); *Knights* v. *Quarles* (9); *Phillips* v. *Homfray* (10); *Peek* v. *Gurney* (11); *Twycross* v. *Grant* (12); Addison on Torts, 8th ed., p. 89; and there is no reason why the doctrine should not apply to contracts where the personal element predominates. In the present case no such question arises. The decision in *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (13), upon which reliance is placed by the plaintiff for the proposition that in a case of contract a single cause of action may be split up and the incidental injury to the deceased's estate may be recovered, was erroneous and ought not to be followed. That decision was criticized in *Leggott* v. *Great Northern Ry. Co.* (14), and a difficulty was felt about it by FitzGibbon L.J. in *Daly* v.

(1) (1805) 1 Bos. & P. N. R. 293.
(2) 2 M. & S. 408.
(3) 20 Q. B. D. 494.
(4) 20 Q. B. D. 499.
(5) [1909] 1 K. B. 564.
(6) 9 Q. B. D. 110.
(7) (1866) L. R. 1 Ex. 313, 315, 316.
(8) 1 Cowp. 376.
(9) 4 Moore, C. P. 532; 2 Brod. & B. 102.
(10) 24 Ch. D. 454.
(11) (1873) L. R. 6 H. L. 377, 392, 393.
(12) (1878) 4 C. P. D. 40, 47.
(13) L. R. 10 C. P. 189.
(14) (1876) 1 Q. B. D. 599, 605, 607.

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Dublin, Wicklow, and Wexford Ry. Co. (1); it is inconsistent with the decisions in *Hodgson* v. *Sidney* (2) and *Pulling* v. *Great Eastern Ry. Co.* (3), and the approval of it by Lord Halsbury in *The Greta Holme* (4) and by Farwell L.J. in *Jackson* v. *Watson & Sons* (5) was upon a point which is not now questioned, and which had no reference to the splitting up of one single cause of action. The decision in *Bradshaw's Case* (6) was based upon *Potter* v. *Metropolitan Ry. Co.* (7), but it was pointed out by FitzGibbon L.J. in *Daly* v. *Dublin, Wicklow, and Wexford Ry. Co.* (8) that in *Potter's Case* (7) "the damage was done to the wife in her husband's lifetime, and the injury to her was not personal to him, but was a cause of expense to him in getting her cured."

The only English cases where the question of the survival of the cause of action in cases of breach of promise of marriage arose are *Chamberlain* v. *Williamson* (9) and *Finlay* v. *Chirney.* (10) Those cases only decided that an action for breach of promise of marriage does not survive in favour of or against executors where no special damage is alleged, and in each case the Courts left open the question whether the action would survive on proof of special damage. There are dicta in Lord Esher's judgment in *Finlay* v. *Chirney* (11) which give rise to the difficulty. But they only amount to this, that in deference to the suggestion in *Chamberlain* v. *Williamson* (9) he would not say that the action would not lie upon proof of special damage, but that he could hardly conceive of a case where such special damage could arise. The four cases in America—*Stebbins* v. *Palmer* (12), *Lattimore* v. *Simmons* (13), *Smith* v. *Sherman* (14), and *Hovey* v. *Page* (15)—proceed upon the same lines, and only decide that an action for breach of promise of marriage does not survive where no special damage is alleged. Upon this ground, therefore, the appeal fails.

Next, even if special damage will in any circumstances keep the

(1) 30 L. R. Ir. 526.
(2) L. R. 1 Ex. 313.
(3) 9 Q. B. D. 190.
(4) [1897] A. C. 601.
(5) [1909] 2 K. B. 203.
(6) L. R. 10 C. P. 189.
(7) 32 L. T. 36.
(8) 30 L. R. Ir. 527.
(9) 2 M. & S. 408.
(10) 20 Q. B. D. 494.
(11) 20 Q. B. D. 494, 499, 500.
(12) (1822) 18 Mass. 71.
(13) (1825) 13 Sergeant & Rawle (Penn.), 183.
(14) (1849) 58 Mass. 408.
(15) (1867) 55 Maine, 142.

action alive pro tanto, no special damage was proved here. The loss of a business is not special damage; it is a fact which may be proved as enhancing the general damages. Before the Judicature Acts the matter could not have been specially pleaded, and now under Order XIX., r. 4, it may be pleaded as a material fact, though it is not part of the cause of action: *Millington* v. *Loring*. (1) Nor does the damage flow from the breach of contract. It is said that the damage was in the contemplation of the parties at the time of the promise and is therefore recoverable. But Bowen L.J. in the passage in *Finlay* v. *Chirney* (2) relied upon was referring, not to an alternative head of damages, but to the question of remoteness of damages, as appears from his use of the same language in *Cobb* v. *Great Western Ry. Co.* (3) It cannot be said that the giving up of the business in 1910 flowed from the breach of contract some time afterwards. The plaintiff lost the business whether the marriage took place or not. What she lost when the breach occurred was the marriage and not the business. That is the sole damage flowing from the breach. The judgment of the learned judge was right also upon this point. [They also referred to Sedgwick on Damages, 9th ed., vol. 2, s. 637.]

[PICKFORD L.J. referred to *The Argentino*. (4)]

[They also contended that there was no corroboration of the plaintiff's evidence of the promise to marry, as required by s. 2 of the Evidence Further Amendment Act, 1869, and referred to *Wiedemann* v. *Walpole*. (5) They were not called upon on the question of costs.]

J. D. Crawford in reply. No authority has been cited for the proposition that there is here only one cause of action for one wrong, and that, as the claim for damages for the personal wrong dies, all other claims die with it. The case of *Hatchard* v. *Mège* (6) is directly opposed to it. In that case a document was complained of as defamatory, and it was held that, so far as it was a libel on the plaintiff, the action did not survive the death of the plaintiff, but that, so far as it was a malicious

(1) 6 Q. B. D. 190.
(2) 20 Q. B. D. 507.
(3) [1893] 1 Q. B. 459, 464.
(4) (1888) 13 P. D. 191, 200, 201.
(5) [1891] 2 Q. B. 534.
(6) (1887) 18 Q. B. D. 771.

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statement causing damage to the plaintiff's goods, the action survived. *James* v. *Morgan* (1) turned upon the construction of the particular agreement, and it was held that the payments which the father of a child had agreed to pay to the mother were not to continue after the mother's death. *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (2) has only been questioned in one case, *Leggott* v. *Great Northern Ry. Co.* (3), and the Court there followed it, and, as Lord Ashbourne L.C. and FitzGibbon L.J. pointed out in *Daly* v. *Dublin, Wicklow, and Wexford Ry. Co.* (4), an appeal was invited, but never taken. As to the question whether the damage claimed flowed from the breach, the question really is, is the damage claimed special damage? If it is, it can be recovered. [Bullen and Leake's Precedents of Pleadings, 3rd ed., p. 12, was referred to. He also contended that there was corroborative evidence of the promise, and referred to *Wilcox* v. *Gotfrey*. (5)]

Cur. adv. vult.

Dec. 15. SWINFEN EADY L.J. read the following judgment:— This is an appeal by the plaintiff, in an action for breach of promise of marriage, from the judgment of Lush J. at the trial ordering judgment to be entered for the defendant notwithstanding the findings of the jury. On the other hand the defendant has contended that the judge was wrong in allowing the case to go to the jury and holding that there was any material evidence in corroboration of the plaintiff's evidence in support of the promise. The writ in the action was issued on December 15, 1913, and the defendant died on January 12, 1914, the action being continued against his executor. The plaintiff, in her statement of claim delivered on April 2, 1914, alleged that a promise to marry was made by Arthur William Thomas, the original defendant, on or about March 17, 1897, but that the engagement was broken off; that in May, 1906, she commenced business as a milliner; that in or about the month of May, 1910, the said A. W. Thomas promised to marry her and at the same time asked her to give up her business of a milliner, and she in consideration of his promise to marry her then agreed to give up her business.

(1) [1909] 1 K. B. 564.
(2) L. R. 10 C. P. 189.
(3) 1 Q. B. D. 599.
(4) 30 L. R. Ir. 524, 527.
(5) (1872) 26 L. T. 481.

At the trial the plaintiff fixed the date of the promise as June 6, 1910. After the evidence had been given the plaintiff was allowed to amend her statement of claim by alleging a promise to marry in or about the month of June or July, 1909, on an occasion when she and the said A. W. Thomas visited Bristol, and that this promise was repeated in May, 1910, on which occasion, in consideration of the promise, the plaintiff agreed to give up her millinery business.

The plaintiff in her evidence stated that on March 17, 1897, she became engaged to the said A. W. Thomas; that in September, 1897, he seduced her in her rooms at Swansea—she was twenty-four and he was about forty-two; that at Christmas, 1897, he gave her an engagement ring, which she returned to him when the engagement was broken off; that immoral relations subsisted between them between 1897 and 1901, when the engagement was broken off; and in the autumn of the latter year she went to London. She did not see him again until 1908, when she caught sight of him in London and wrote to him the letter of May 9, 1908. He sent her 10*l.* to Folkestone in 1908 when she was ill, but did not visit her. She next saw him in March, 1909, when immoral relations between them were resumed. The last time she met him was in March or April, 1911, at a house which she describes as a "dubious place," and to which she had previously been with him. She never saw him from that time till 1913, when she saw him in the street at Swansea. The earliest date at which the plaintiff alleges any breach of the promise to marry her "within a reasonable time" is April, 1912.

An action for breach of promise of marriage, where no special damage is alleged, does not survive against the personal representatives of the promisor: *Finlay* v. *Chirney*. (1) But the plaintiff claims that in this case she has alleged and proved special damage, and reliance was placed upon what was said by Lord Esher in *Finlay* v. *Chirney*: "Then it is also said by the plaintiff that she had given up a better place, and if at the time of the contract to marry the plaintiff had agreed to give it up at once or before the wedding day, it might be special damage, as being part of the consideration for the promise to marry; but it must be brought to the knowledge of the other party at the time of the contract in

(1) 20 Q. B. D. 494, 501.

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order to bring it within the principle in *Hadley* v. *Baxendale* (1); if the agreement to give up the place were made after the contract to marry it would be no part of the promise."

Now the plaintiff was in a difficulty about corroboration at the trial, as the promise sued on was the promise alleged to have been made about May, 1910, and fixed at the trial as June 6, 1910, while the only corroboration, apart from three letters to which I will refer, was corroborative evidence of a promise existing and in force in 1909. In consequence the plaintiff obtained leave to amend her statement of claim by alleging a promise in 1909 which she deposed to at the trial. But this involves her in another difficulty. The agreement to give up her business was then made after the contract to marry and while that contract was subsisting, and formed no part of the consideration for that promise to marry, as it was made subsequently and could not have been brought to the knowledge of the other party at the time of the contract, and so will not be special damage. And the fact that on June 6, 1910, A. W. Thomas merely repeated a promise of marriage, by which he was already bound, will not constitute a new contract, or afford any consideration for the plaintiff agreeing to give up her business. If therefore the plaintiff relies on the promise of 1909, there was no special damage alleged and the action does not survive against the defendant. If the plaintiff relies on the promise of June 6, 1910, the question is whether there is any corroborative evidence of this promise. No witness besides the plaintiff gave evidence with reference to this promise, but reliance is placed upon three letters written by Arthur Thomas. [The Lord Justice referred to the letters.] In my judgment the three letters of Arthur Thomas relied on do not corroborate in any way whatever the alleged promise made on June 6, 1910, and are indeed quite inconsistent with it. There is no corroborative evidence whatever of such promise, and the judge should have decided that in the absence of such evidence there was no case to go to the jury. The judgment entered by him for the defendant notwithstanding the verdict was therefore right.

This is sufficient to dispose of the appeal, but having regard to the argument addressed to us I must add that I have grave doubts

(1) 9 Ex. 341.

whether the action will lie, even if special damage be proved. The passages in *Chamberlain* v. *Williamson* (1) and in *Finlay* v. *Chirney* (2) relied upon by the appellant were dicta only. There is no case in which such damage has been actually recovered. The action to recover damages for breach of promise to marry is an anomalous one, and as such actions have been known to the law from a date anterior to 1651 (see *Baker* v. *Smith* (3)), and damages have never yet been recovered after the death of the promisor, the Court would probably take the view that the action ought not to be further extended by judicial decision. The action is really an action for a breach arising from the personal conduct of the defendant and affecting the personality of the plaintiff. In such an action the injury is treated as a personal one, and damages are awarded in respect of the personal injury to the plaintiff occasioned by the personal conduct of the defendant; the conduct of both parties may be taken into account in assessing damages, and circumstances of mitigation or aggravation may be given in evidence; monetary expenditure or giving up a post or change of position in reliance on the promise may certainly be given in evidence as aggravating circumstances; and damages may be given of a vindictive and uncertain kind, not merely to repay the plaintiff for temporal loss, but to punish the defendant in an exemplary manner; the damages are entirely at large, and, whatever matters are taken into account, the damages awarded are one lump sum. It is difficult to see how, in such a case, there can be any "special damage" properly so called. The sounder view appears to be that the action will not lie in any case after the death of the promisor.

In the present case, for the reasons already given, the appeal fails.

PHILLIMORE L.J. read the following judgment:—This is an action by the plaintiff, a single woman, for breach of promise of marriage, begun against the man and revived against his executor. In the statement of claim delivered after the revivor the plaintiff alleged an early promise on March 17, 1897, broken off and renewed in or about May, 1910, and, as her counsel construes her pleading, laid

(1) 2 M. & S. 408. (2) 20 Q. B. D. 494.
(3) (1651) Sty. 295.

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the promise of May, 1910, as a promise by the man that, if she would give up her business as a milliner and marry him, he would marry her. I have some doubt whether this is the true construction of the pleading, but let it pass. By amendment, which she was allowed to make during the trial, she added an allegation of an intermediate promise in June or July, 1909, and stated that the man repeated this promise in May, 1910, and then promised on the terms already stated. The date May, 1910, was afterwards altered to June 6, 1910. She made no claim for ordinary or general damages, but claimed as special damage the loss occasioned to her by giving up her business as a milliner.

At the close of the plaintiff's case it was submitted on behalf of the defendant that there was no case to answer. The judge reserved the point. It was also submitted that there was no material corroboration of the plaintiff's evidence. As to this, the judge with some doubt held that there was just enough. No evidence was called for the defendant. The judge thereupon left the following questions to the jury: (1.) Did the deceased promise to marry the plaintiff (*a*) in June or July, 1909; (*b*) on June 6, 1910? (2.) Has she suffered any and what special damage through the breach (telling them that for their purposes they might treat the loss of the milliner's business as special damage)? The jury answered Yes to all the questions and assessed the damages at 350*l*.

Upon further consideration Lush J. held that there was sufficient evidence of a bargain that the plaintiff should give up her business in consideration of a promise to marry, and of her having suffered by giving up her business. This left three points for his decision: first, whether an action for breach of promise whereby special damage has arisen can be maintained against the executor of the person who has broken his or her contract; secondly, whether the loss sustained by the plaintiff through giving up her business could properly be treated as special damage; and thirdly, whether it was damage arising from the breach. The last two questions rather run into one. The judge decided them all in favour of the defendant, and from his decision the plaintiff appeals. The defendant's advisers notified those of the plaintiff that on the appeal they should contend that there was no material corroboration of the promise, and his counsel have raised this point before us.

This point must be taken first. There was corroboration of the alleged promise in 1909. But this is by itself of no value. That engagement was one of simple mutual promises to marry. The giving up of the milliner's business formed no part of that bargain. It is difficult to see how there could be any consideration for a further promise in 1910, which is the only one which will avail the plaintiff, if the promise of 1909 was still a subsisting engagement; and it is not alleged that it had been rescinded. What alone will be of use to the plaintiff is corroboration of the promise in 1910. As to this it is said that evidence of antecedent conduct may be confirmation. So I think it may sometimes, as was held, and apparently for good reasons, in *Wilcox* v. *Gotfrey*. (1) But what is the antecedent confirmation here? It is said that they had been engaged once and had broken it off; that they had been engaged a second time and either broke it off again, which does not give corroboration to her evidence as to a third promise, or did not break it off again, in which case the supposed third promise is nugatory. It is further said that the letters she wrote to him, and to which no answers have been except in three cases preserved, demanded an answer, and that his silence is an admission. The case of *Wiedemann* v. *Walpole* (2) shows how this point is to be treated. There may be circumstances in which there is a duty to answer letters, or in which the probability is so strong that a letter would be answered, that an inference may be drawn from silence. But the general rule is otherwise.

Now the question of corroboration is for the Court. There are a number of letters, of the earlier of which she produces her drafts, and the later of which are produced by the defendant. Assuming that there are some which the jury, if the letters got to them, might construe as averring, not merely a promise of marriage, but the only promise of marriage which will help her, these letters came after other letters of a different character; and if a woman, who has been a man's mistress, first writes asking for money on general grounds, and afterwards changes her tune and avers a breach of promise, it cannot be that any inference is to be drawn from the fact that the man did not answer her later letters. Besides this, as to the letters which are drafts we have only her word;

(1) 26 L. T. 481. (2) [1891] 2 Q. B. 534.

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there is no corroboration; and as to his not having answered, we have her own evidence that she destroyed many of his letters. She says that these destroyed letters contain admissions. But they may just as well have contained denials. We have only her word. With deference to the learned judge (who indeed hesitated upon this point) I think there was no material corroboration of the promise of 1910, and that on this ground the action fails.

But there remain the other two points; and on one of them I wish to base my judgment in favour of the defendant quite as much as upon the first point.

Can an action for breach of promise of marriage lie against an executor? It would savour of undue curiosity to make this judgment a vehicle for a disquisition upon the origin and modifications of the maxim actio personalis moritur cum persona. The position under the common law as aided by the statute 4 Edw. 3, c. 7, is now pretty well settled. If the persona mortua be the claimant, his executor cannot obtain any benefit for his estate by acquiring damages which would have been given only as compensation to the living man for injury to his body or to his character. And this rule applies equally whether the claim arises in respect of some tortious injury or in respect of a breach of contract, such as that of a railway company to carry carefully or of a surgeon to perform an operation skilfully. But if the tort or the breach of contract occasion damage to the dead man's property the executor can recover damages, limited to compensation for this special loss. The cases of *Knights* v. *Quarles* (1), *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (2) (as far as it is an authority), *Leggott* v. *Great Northern Ry. Co.* (3), and *Hatchard* v. *Mège* (4) are illustrations of this.

Now let the claim have arisen against the persona mortua. If it be a claim in tort, however slight the tortious quasi-criminal element may be, that is to say, if it be a claim to which the defence of the general issue would under the old pleading have taken the form of "not guilty," no action lies against the executor. This may be considered settled since the decision in *Hambly* v. *Trott.* (5) There are two exceptions. One is by virtue of the special provisions for

(1) 4 Moore, C. P. 532; 2 Brod. & B. 102.
(2) L. R. 10 C. P. 189.
(3) 1 Q. B. D. 599.
(4) 18 Q. B. D. 771.
(5) 1 Cowp. 371.

certain cases made by the statute 3 & 4 Will. 4, c. 42. The other is the action upon the custom of England against the executors of a deceased incumbent for dilapidations, so far as this form of action remains since the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43). If, however, the action be for breach of contract, the cause of action apparently survives against the executor, whatever may have been the nature of the injury caused by the breach of contract, whether it be an injury to the living man's person or his property; and this seems sound in principle.

Now to deal with the one special action of breach of promise of marriage. It is an action for breach of contract, and would therefore seem to survive against the executor of the contract-breaker, but it is an action of a special character where the measure of damages may be that which is otherwise only applicable in some actions of tort. Exemplary or punitive damages can be given. The misconduct of the defendant can be used for enhancing the damages, though it has no direct bearing upon any question of compensation of the plaintiff. It has therefore been questioned whether in the matter of survivorship this action ranks with actions of tort, or whether it ranks with ordinary actions for breach of contract.

There have been two cases where one or other of the parties was dead reported in England, and four in America. In none has the action succeeded. But there have been expressions of opinion in both the English cases, and in some, I think, of the American, that such an action might survive if special damage issuing from the breach were pleaded and proved. In *Chamberlain* v. *Williamson* (1) the injured party was dead, and the claim was made by her personal representative. The rule was there stated to be that all actions strictly personal (that is, as I understand, for compensation for injury to character or person) die with the persona; that executors and administrators are the representatives of the property, that is, the debts and goods, of the deceased, but not of his wrongs, except where those wrongs operate to the temporal injury of his personal estate. "But in that case the special damage ought to be stated on the record; otherwise the Court cannot intend it." The Court proceeded to state that "loss of marriage may, under circumstances, occasion a strict pecuniary loss to a woman, but it does not

(1) 2 M. & S. 408.

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necessarily do so; and unless it be expressly stated on the record by allegation the Court cannot intend it." In that case there were no special circumstances. It was an ordinary action of breach of promise and failed. In the other English case, *Finlay* v. *Chirney* (1), it was the promise-breaker who was dead. The matter came before the Court of Appeal in a somewhat peculiar manner. At the trial the plaintiff was nonsuited upon the ground that there was no corroboration of the promise. The Divisional Court thought that this was wrong and proposed to send the case down for a new trial. The objection was taken before the Divisional Court that the executors of a deceased promisor would not be liable, but the Court thought the matter should still go down for a new trial. The executors appealed to the Court of Appeal. The original pleadings contained no suggestion of special damage, but the Divisional Court gave leave to the plaintiff to amend in this respect and give particulars. In the Court of Appeal she was required to support these particulars by affidavit, and upon this footing the Court of Appeal proceeded to discuss the case. The Court was of opinion that none of the particulars alleged were particulars of special damage in the proper meaning of the term and therefore that the action must fail, and gave judgment for the executors.

In the course of the case the whole matter of survival of such a cause of action was discussed at large both in the arguments and in the judgment. It is said, and truly said, on behalf of the plaintiff that the fact that the Court allowed the discussion of the particulars indicates that in their view, if special damage could be proved, the action would lie. On the other hand there is much in the judgment of Lord Esher to show how reluctant he was to allow any such action at all. Indeed he says (2): "I have grave doubts whether it would not be the wisest course to say that even with special damage the action will not lie, but I am not prepared upon the authorities to go that length. I can hardly conceive of a case where such special damage could arise as would support the action." But Bowen L.J., delivering the opinion of himself and Fry L.J., appears finally to express the rule of law as follows (3): "It would seem to follow that with the death of the promisor

(1) 20 Q. B. D. 494. (2) 20 Q. B. D. 499.
(3) Ibid. 507.

all claim to damages of an exemplary or sentimental kind ought to cease, and that such damages only ought to be left as represent compensation for a temporal and measurable loss flowing directly from the breach or within the contemplation of both parties at the date of the promise, and that in an action against executors such a temporal loss, if it is alleged, must be tested according to the ordinary rules as to remoteness as applied to the special facts of the case." Speaking with respect, it is difficult to see any principle which underlies the rule thus laid down. If actions for breach of promise are to be likened to actions of tort, no damages are recoverable against the estate of the dead tortfeasor. If they are to be likened to other actions of contract, the estate of him who has broken his contract and died is as responsible as he himself was when living. It might be possible to rule out those enhanced damages which the conduct of the promise-breaker may subject him to by way of aggravation. They might be considered as arising out of a quasi-tort. It might even be possible to rule out damages which otherwise would be awarded to the living plaintiff for injured feelings, loss of reputation, and injury to bodily health. But some damage is supposed to arise from every breach of contract, even though it be only forty shillings. And I should have thought that the loss of the support and maintenance which a well-to-do husband or a wealthy wife would have afforded was a damage capable of being estimated in money. I should have been glad if Lord Esher had followed his own judgment, and if the other members of the Court had concurred with him. But for the purposes of this case, without desiring to express any opinion of my own, I am content to take it to be the law that in this case an action would lie for special damage.

This leaves a question on which I have no doubt, and which can shortly be disposed of. Is there any allegation or proof in this case of such special damage in the true sense of the words, or—to put the case one step further—is there any allegation of special damage flowing from the breach of promise to marry? Special damage does not mean conduct of aggravation which, under the peculiar rules applicable to this class of action, may be allowed to enhance the damages, as in the cases of *Berry* v. *Da Costa* (1) and *Millington* v. *Loring*. (2) It means damages which lie in the per quod and for loss

(1) L. R. 1 C. P. 331. (2) 6 Q. B. D. 190.

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to the estate of the plaintiff. Assuming for the purposes of this case that there was some evidence that the plaintiff suffered loss by giving up her milliner's business, this loss did not arise from the breach of the promise to marry. It was not something which she gave up or lost because the man refused to marry her; it was something which she agreed to give up in order to induce him to marry her, something by which she bought, as it were, his promise.

The only way in which this matter of giving up her business could properly be introduced into the case at all was as an item of some assistance to the jury in measuring the damages they were to give. If it was worth her while to give up this business in order to get the man to marry her, it might be suggested that her loss by reason of his refusal was at least as great. No doubt Lord Esher, in one passage in his judgment where he is, as it were, thinking aloud (1), suggests that a claim of this kind might be special damage. But he goes no further, and the expression is, I think, only used for the purpose of showing that the claim in that case did not get so far. The judgment of Bowen and Fry L.JJ. gives the rule. The loss must be one "flowing directly from the breach or within the contemplation of both parties at the date of the promise."

It was lastly suggested that some help would be given to the plaintiff by the words "within the contemplation of both parties." This is a mistake. Those words are an alternative to the adverb "directly." The loss must either be one which arises directly, that is, naturally and ordinarily and as one would expect, from the breach, or it must be one which, though it would not always or naturally follow from the breach, was known to both parties as likely in the peculiar circumstances to arise upon the breach. The words do not give a new fountain for damages, but only a new channel. This is made plain, if it were necessary to be made plain, by the language of the same great judge only a few months afterwards in the case of *The Argentino* (2): "Speaking generally as to all wrongful acts whatever arising out of tort or breach of contract, the English law only adopts the principle of restitutio in integrum, subject to the qualification or restriction that the damages must not be too remote, that they must be, in other words, such damages as flow directly and in the usual course

(1) 20 Q. B. D. 501. (2) 13 P. D. 191, 200.

of things from the wrongful act. To these the law superadds in the case of a breach of contract (or, to speak according to the view taken by some jurists, the law includes under the head of these very damages, where the case is one of breach of contract) such damages as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of its breach. With this single modification or exception, which is one that applies only to cases of breach of contract, the English law only permits the recovery of such damages as are produced immediately and naturally by the act complained of."

Assuming, therefore, that an action for breach of promise of marriage will lie against the executor of a deceased promisor to recover special damage occurring to the estate of the plaintiff by reason of the breach of promise, no such damage was alleged or proved in this case, and therefore the action fails, and the principal appeal must be dismissed.

There is a further appeal upon a subsidiary question. The judge has given the defendant the costs of the action. It is suggested for the plaintiff that Order LXV., rr. 1, 2, prevent this, that when there is a trial by jury the costs of each issue follow the event, and that in the present case there were either three issues or one composite issue left to the jury which the jury found in favour of the plaintiff. This argument confounds an issue upon which a verdict has to be taken with a " question " on which there is a " finding," to use the language of Order XXXIX., r. 7, and Order XL., rr. 3, 4. The point is covered by the language of Bramwell L.J. in *Myers* v. *Defries* (1) and the decision of this Court in *Howell* v. *Dering*. (2) The case of *Slatford* v. *Erlebach* (3) is a peculiar one, and only arose because the judgment of an official referee is made like in this respect to the verdict of a jury, and because an official referee being both judge and jury does not withdraw a case from himself. In the case before us Lush J. was asked at the close of the plaintiff's case to rule that there was no case to go to the jury. He did not at the moment decide either way, but took the answers or findings of the jury provisionally or hypothetically. If his view had been that the plaintiff should recover he would on further consideration have

(1) (1879) 4 Ex. D. 176, 180. (2) [1915] 1 K. B. 54.
(3) [1912] 3 K. B. 155.

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entered the verdict and given judgment for her. As it was there was no verdict because he ultimately held that there was no case to go to the jury. If he had mistakenly taken the contrary view and entered the verdict and given judgment for the plaintiff, no one would doubt that when we set the judgment aside we should give the defendant costs here and below. The event cannot be more favourable to the plaintiff because the judge at the trial rightly decided against her. There was no separate issue of law here, as there would have been in the old days of demurrer, or might be now if Order XXV. were involved.

In my opinion the subsidiary appeal also fails.

PICKFORD L.J. read the following judgment:—This case arises out of an alleged breach of promise of marriage made by Mr. Arthur Thomas to the plaintiff. After the writ was issued, but before a statement of claim was delivered, Mr. Arthur Thomas died, and the action was continued against the defendant as his executor.

The statement of claim at first alleged a promise in 1897, unfulfilled by mutual consent, and a later promise in 1910 in consideration of which the plaintiff gave up a business in which she was engaged. After the plaintiff had given her evidence the statement of claim was amended to bring it into accordance with her evidence, and as amended repeated the allegations as to the promise in 1897, alleged a promise in 1909, and repeated the allegations as to the promise in 1910, but substituted the date of June 6, 1910, for that of May. No breach or abandonment of the promise of 1909 was alleged. It is to be noticed that the whole cause of action was rested on a breach of promise of marriage. No special contract of any other nature was alleged or proved. It was conceded on behalf of the plaintiff that no claim for general damages for the breach of the promise could be maintained after the death of Arthur Thomas, but it was contended that damages for the loss of the business given up in 1910 could be recovered against his executor as special damage arising from the breach of the promise and affecting the property of the plaintiff.

The case was tried before Lush J., and the jury found as follows: [The Lord Justice read the findings.] They found no breach of the promise of 1909, and no question was put to them about it. Lush J.,

after consideration, gave judgment for the defendant, and this appeal is brought. The first question that arises is, assuming there was no existing promise before June 6, 1910, and that there was consideration for that promise, will the action lie? It is said that it will in accordance with the dictum of Lord Esher in *Finlay* v. *Chirney* (1): "Then it is also said by the plaintiff that she had given up a better place, and if at the time of the contract to marry the plaintiff had agreed to give it up at once or before the wedding day, it might be special damage, as being part of the consideration for the promise to marry." Assuming these words to cover this case, they do not even amount to a dictum that the action will lie, but only to a suggestion that it possibly may, made by a learned judge who had earlier in the same case stated the extreme difficulty of seeing any special damage which would support such an action.

We are therefore I think justified in examining whether there is any principle upon which the suggestion can be supported. I shall assume that there may be special damage affecting the plaintiff's property of such a nature as to support an action for breach of promise of marriage against the promisor's executor. But it must, in my opinion, be damage arising from the breach either as a natural consequence or within the principle of *Hadley* v. *Baxendale*. (2) The loss of this business did not arise from the breach at all. It is not a case in which the obtaining or retaining of a position depended upon the plaintiff being a married woman, in which case the loss of that position might be said to be the consequence of the refusal to marry her. In this case the giving up of the business was the consideration or part of the consideration for the promise, but the measure of damages for the breach of a contract is not the amount of the consideration that is given for it. If a sum of money be paid in consideration of a contract which is wholly repudiated, it may be recovered back, not as damages for the breach of the contract, but as money had and received upon a consideration which has failed. But this is not a case of that kind. This is a case of damages, and the question is whether the loss of this business was damage flowing from the breach. In an ordinary action of contract it clearly would not. The measure in such cases is stated in two passages in Lord Atkinson's judgment in *Addis* v. *Gramophone*

(1) 20 Q. B. D. 501. (2) 9 Ex. 341.

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Co. (1), where he applied the rule of law to a breach of a contract of service. Quoting Cockburn C.J. in *Engel* v. *Fitch* (2), who in his turn was quoting Parke B. in *Robinson* v. *Harman* (3), he said that a vendor who fails to perform his contract is bound to place the purchaser, so far as money will do it, in the position he would have been in if the contract had been performed; and he said: "He" (that is, the plaintiff in an action for breach of contract) "is to be paid adequate compensation in money for the loss of that which he would have received had his contract been kept, and no more."

Now if the contract had been kept the business would have been equally gone. If the contract were one which could be ordered to be specifically performed and specific performance had been decreed, the business would still be gone and no damages would be given for its loss; and if damages were given such as put the plaintiff in the same position as if the contract had been performed, additional damages for the loss of the business could not be given, as the plaintiff would recover twice over; she would get the advantage of the contract and also get back the consideration she had given in order to obtain it.

It was not, I think, seriously disputed that this principle was sound in the case of ordinary actions ex contractu, but it was contended that in an action of breach of promise of marriage, even when it is considered as arising strictly ex contractu, the measure of damages is different. I think there is no foundation for this. An action of breach of promise is no doubt anomalous. It is an action arising ex contractu, but the damages are not confined to such damages as are recoverable in other such actions. It is competent to give what are sometimes called punitive damages, i.e., such as will compensate the plaintiff not only for the money loss of the contract, but for the personal wrong that has been done to her. For this reason evidence of the loss of a business could be given to show the conduct of the defendant in breaking off an engagement after such a sacrifice by the plaintiff, just as evidence of seduction or other bad conduct by the defendant could be given to enhance the damages. But there is nothing to show that such evidence can be

(1) [1909] A. C. 488, 494, 496. (2) (1868) L. R. 3 Q. B. 314, 330.
(3) (1848) 1 Ex. 850, 855.

given to support damages as arising ex contractu. If the deceased man had lived and the plaintiff had recovered general damages, the measure of such damages would have included the loss of the benefit of the marriage, and therefore to have given anything for the loss of the business except as a circumstance enhancing the so-called punitive part of the damages would have been wrong. She has by his death lost her claim for general damages, but that cannot make the loss of the business a loss arising from the breach. Such a contention seems also to me to be negatived by Bowen L.J. in delivering the judgment of himself and Fry L.J. in *Finlay* v. *Chirney* (1), where he says: "The decision in *Chamberlain* v. *Williamson* (2) shows, at all events, that the Courts of this country will, even although an action for breach of promise be an action arising out of contract, apply the general principles of the maxim 'actio personalis' to so much of the damages as are a remedy for mere personal wrong, and will allow so much of the remedy to survive as seems to belong to the ordinary category of actions ex contractu." The remedy asked for here is not a remedy that belongs to the ordinary category of actions ex contractu. I think, therefore, that on principle and authority the suggestion made by Lord Esher M.R. is not sound and that it probably arose from the learned judge overlooking the distinction between the consideration given to obtain a contract and the measure of damages for its breach.

This is enough to dispose of the case, but I think the plaintiff's case fails also on a narrower ground. I think her case falls within the instance put by Lord Esher in which the action would not lie. The amended pleading correctly represents the plaintiff's evidence. She gave evidence of a promise in 1909; she gave no evidence of a breach of it, and if it were subsisting at the time of the alleged promise in 1910, that promise was merely a repetition and an undertaking to fulfil a promise already made and an obligation already existing. The request to give up her business is made after the contract, and in that case Lord Esher says it is not special damage supporting such an action as this. (3) She not only does not prove a breach of the promise of 1909; she does not give any evidence pointing to it. About a year had elapsed; she does not

(1) 20 Q. B. D. 506. (2) 2 M. & S. 408.
(3) 20 Q. B. D. 501.

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mention any request by herself in the meantime that it should be performed or anything in word or deed except the mere lapse of time pointing to a refusal by the deceased. The only matter to which her counsel referred was that she gave evidence that she said to him "Can I trust you this time," but, considering there had been an unfulfilled promise years before, this does not go to show a breach of the promise of 1909.

If she had proved such a breach and relied upon the promise of 1910 as an entirely new promise, I think there are great difficulties in her way, for I find it very difficult to see any corroboration of such a promise. The corroboration suggested was the previous relations of the parties and the fact that, as alleged, the deceased did not in answer to letters of hers deny such a promise. Previous relations may be corroboration; but I cannot see that the fact that two people have lived for some years with immoral relations from time to time existing between them, and that the man has on two occasions promised to marry the woman and has not done so, is any evidence that he made a third promise of the same sort. With regard to the correspondence, there are letters from her to him asking for money, and he sent her some money, and in some of these letters she refers to broken promises to marry. Such letters as do remain of his are certainly not admissions of anything of the kind; they are rather inconsistent with it. But she says that to some of her letters referring to promises of marriage she got no answer. This rests upon her evidence alone, but, assuming it to be true, I do not think it is any corroboration. The references are general to broken promises. She nowhere specifically asserts a promise to marry in 1910. If there were no other promise but that of 1910 to which these letters could refer, it might be necessary to consider whether the circumstances called for a denial. But, according to the plaintiff's case, on this assumption there were an unfulfilled promise in 1897 and a broken one in 1909 to which the allusions might well refer, and there was nothing in the letters to call for a denial of the promise of 1910. But so far from specifically asserting a promise to marry when she agreed to give up her business in 1910, she refers to it on several occasions and gives a different account of the promise which he made to her on that occasion. [The Lord Justice read and commented on the letters.]

Taking the view which I do on the other part of the case, it is not necessary to decide this point, but my impression is very strong that there was no corroboration of any promise in 1910.

The appeal must be dismissed.

I agree also that the appeal as to costs should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Cohen & Cohen.*

Solicitors for defendant: *Eland, Nettleship & Butt.*

W. F. B.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1915 *Aug.* 3; *Sept.* 7. C. A. *Nov.* 18, 19; *Dec.* 15, 16, 21.

ZINC CORPORATION, LIMITED *v.* HIRSCH AND OTHERS.

[1915 Z. 364.]

Alien Enemy—Contract by British Mine Owner—Sale of Zinc Concentrates to Subjects of Germany resident there—Sale of whole Production of Concentrates—Prohibition against selling to other Persons—Outbreak of War—Illegality of Contract.

By a contract made in 1908, as varied and extended by a contract made in 1910, the plaintiffs, a company incorporated in England, agreed to sell and the defendants, who resided and carried on business in Germany, agreed to purchase during each of the ten years 1910 to 1919, both inclusive, the whole of the plaintiffs' production of zinc concentrates at their mine in Australia, such production not to be less than 85,000 tons nor more than 95,000 tons in each year; and the plaintiffs were prohibited, so long as the contract should be in force, from selling any zinc concentrates to any person other than the defendants, who were entitled at any time to leave 2200 tons of concentrates on the plaintiffs' floors and 800 tons in their vats at the plaintiffs' expense. By clause 17 of the contract of 1908 it was provided that in the event of (inter alia) any strike, suspension of labour, floods, fire, stoppage of water supply, acts of God, force majeure, or any cause beyond the control of either the sellers or the buyers preventing or delaying the carrying out of the contract, "then this agreement shall be suspended during the continuance of any and every such disability." War was not specified as a cause of suspension. The contract contained various provisions as to notices being given, as to fixing the price of and the method and time of payment for the concentrates, as to weighing, sampling, and assaying the concentrates, and as to other matters. On the

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outbreak of war between Great Britain and Germany on August 4, 1914, the defendants became alien enemies. In an action for a declaration that the contract was dissolved by the existence of the war :—

Held by the Court of Appeal, that, assuming that war was a cause of suspension within clause 17 of the contract of 1908, the suspension was only of deliveries of concentrates and not of the whole contract, and that the effect of the prohibition against selling to any person other than the defendants was to prevent the plaintiffs from using their resources for the benefit of this country ; that therefore the further performance of the contract after the outbreak of war became illegal as being detrimental to the interests of the country and of assistance to the King's enemies ; and that the contract was dissolved.

Held, also, by Swinfen Eady and Phillimore L.JJ. (Pickford L.J. not dissenting), affirming the decision of Bray J., that the continued existence of the contract would involve commercial intercourse with the enemy, and upon that ground also the agreement had become illegal and was dissolved.

Semble, per Bray J. : Neither the expression " force majeure " in clause 17 of the contract of 1908 nor the general words at the end of the clause included war as a cause of suspension.

TRIAL of action before Bray J. without a jury.

The plaintiffs claimed a declaration that an agreement dated April 4, 1912, was abrogated and avoided by the existence of a state of war between Great Britain and Germany on August 4, 1914, and that the plaintiffs were released and absolved from any duty or obligation at any time to supply to the defendants, their servants, agents, nominees or assigns, the plaintiffs' production of zinc concentrates or any part thereof, or otherwise to observe and perform the said agreement or two earlier agreements of December 14, 1908, and June 20, 1910. (1)

The plaintiffs were a company incorporated in England pursuant to the Companies (Consolidation) Act, 1908, having their registered and head office in the city of London. The main business of the plaintiffs was the production of zinc concentrates at Broken Hill in the State of New South Wales, Australia. The defendants were metal merchants and smelters resident and carrying on business at Halberstadt in Germany, and were therefore after the declaration of war between Great Britain and Germany on August 4, 1914,

(1) The action was brought under the Legal Proceedings against Enemies Act, 1915 (5 Geo. 5, c. 36), s. 1.

alien enemies. On December 14, 1908, a contract was entered into between the Zinc Corporation, Limited (a company incorporated in the State of Victoria, Australia), the predecessors of the plaintiffs, and the defendants whereby the company agreed to sell to the defendants 355,000 to 385,000 tons of zinc concentrates produced or to be produced at Broken Hill; deliveries of the concentrates to be taken at Broken Hill in about equal monthly deliveries as far as the sellers' production would allow.

Clause 17 was as follows: "In the event of any strike, lock-out, combination of workmen, interference of trade unions, suspension of labour whether partial local or general and from whatsoever cause arising, floods, storms, fire, stoppage of water supply, washaways of railways, accidents, acts of God, force majeure or perils of the sea, breakdown of machinery or inability of the Silverton Tramway Company to provide the necessary trucks for taking away the concentrates or in the event of any cause beyond the control of either the sellers or the buyers preventing or delaying the carrying out of this agreement then this agreement shall be suspended during the continuance of any and every such disability."

The contract, which was very elaborate, contained various other provisions as to notices being given by the sellers, as to fixing the price of and the method and time of payment for the concentrates, the payment to be made in Melbourne, Victoria, as to weighing, sampling, and assaying the concentrates, and as to arbitration between the parties.

By a contract of June 20, 1910, varying and extending the provisions of the previous contract and confirming it as so modified, the company were to sell and the defendants were to purchase during each of the ten years 1910 to 1919, both inclusive, the company's production of zinc concentrates, such production not to be less than 85,000 tons nor more than 95,000 tons in each year.

By clause 3 of this agreement it was provided that "the sellers shall not so long as this agreement shall be in force sell any zinc concentrates to any person or persons firm or firms or corporation or corporations other than the buyers."

Clause 5 provided that 2200 tons of concentrates might at any time be left by the buyers on the sellers' floors and 800 tons in the sellers' vats, both at the sellers' risk without payment.

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The terms of these two contracts are more fully referred to in the judgments.

On July 9, 1911, the plaintiff company was formed and bought the undertaking of the Zinc Corporation, Limited (Incorporated in Victoria); and on April 4, 1912, the contract above referred to was entered into between the Zinc Corporation, Limited (Incorporated in Victoria), and its liquidator, the plaintiffs, and the defendants, by which the plaintiffs undertook to perform the contract of December 14, 1908, as modified by the contract of June 20, 1910, and to be bound by the terms thereof in every way as if the plaintiffs were parties thereto in lieu of the Victorian company; and the defendants released and discharged the Victorian company and its liquidator from the contract and accepted the liability of the plaintiffs upon the contract in lieu of the liability of the Victorian company, and agreed to be bound by the terms of the contract so modified as if the plaintiffs had been named in it as a party thereto in place of the Victorian company. This contract was acted upon until a few days before August 4, 1914, when the defendants gave to the plaintiffs notice that they should discontinue taking ore, and deliveries of zinc concentrates by the plaintiffs to the defendants thereupon ceased.

At the trial before Bray J. Mr. Govett, the chairman of the plaintiff company, explained the position and showed the great difficulty the plaintiffs would have in selling their concentrates if, on the termination of the war, they were bound to resume deliveries to the defendants. They were so great that the plaintiffs had ceased to produce ores since the outbreak of the war. No evidence was called for the defendants.

Gore-Browne, K.C., and *F. Dodd*, for the plaintiffs. On August 4, 1914, when war broke out, the contract of 1912 between the plaintiffs and the defendants was dissolved. The provision in clause 17 of the agreement of 1908 that "this agreement shall be suspended during the continuance of any and every such disability" only means that, on the assumption that war comes within the category of disabilities therein mentioned, deliveries of the zinc concentrates shall be suspended. The provision does not mean that the whole agreement shall be suspended. The further performance

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of the contract therefore became illegal, inasmuch as it would involve commercial intercourse with the enemy during the war. If in the case of a contract made before the war with a person who becomes an alien enemy anything remains to be done under it after the outbreak of war beyond mere payment, the further performance of the contract becomes illegal and it is dissolved. Where, however, the cause of action accrued before the war, and nothing remains to be done under the contract except payment, the contract is only suspended during the war.

In *Janson* v. *Driefontein Consolidated Mines* (1) Lord Lindley said that "War produces a state of things giving rise to well-known special rules. It prohibits all trading with the enemy except with the Royal licence, and dissolves all contracts which involve such trading," and referred to *Esposito* v. *Bowden* (2), where Willes J., in delivering the judgment of the Exchequer Chamber, adopted the language of Lord Tenterden in his work on Shipping, 5th ed., p. 427: "If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the Government of the country, the agreement is absolutely dissolved." Lord Alvanley C.J. in *Furtado* v. *Rogers* (3) said that "it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his own country." In *Robson* v. *Premier Oil and Pipe Line Co.* (4) it was laid down by the Court of Appeal that "a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy" came within the principle upon which intercourse is prohibited, namely, that of public policy. A negative clause is within that principle. The test, therefore, is, is the contract detrimental to the interests of this country or beneficial to the enemy country? If it is, it is illegal and is dissolved on the outbreak of war. Contracts which involve commercial intercourse with the enemy are therefore illegal.

The further performance of this contract is detrimental to the interests of this country and beneficial to the enemy country on a further ground. By clause 3 of the agreement of 1910 the plaintiffs

(1) [1902] A. C. 484, 509.
(2) (1857) 7 E. & B. 763, 784.
(3) (1802) 3 Bos. & P. 191, 198.
(4) [1915] 2 Ch. 124, 136.

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cannot sell zinc concentrates to any person other than the defendants, and by clause 5 the defendants have a right to leave 2200 tons of concentrates on the plaintiffs' floors and 800 tons in their vats. It is contrary to the interests of this country that the plaintiffs should be prevented from using their resources, especially in the case of so valuable a product as zinc concentrates, for the benefit of their country, and that they should be obliged to increase the resources of the enemy by holding such large quantities available for them after the war. The plaintiffs cannot sell to the defendants, who are alien enemies, nor can they sell to any other person without committing a breach of clause 3 of the agreement of 1910.

War, moreover, is not one of the causes enumerated in clause 17 as giving rise to the suspension of the contract, nor is it included in the expression "force majeure." By "force majeure" is meant some cause of a physical nature affecting the means of production or delivery of the concentrates. The clause does not contain the expression "restraint of princes," with which war might be ejusdem generis, and it is not ejusdem generis with force majeure. Force majeure differs from war in that it does not make a contract illegal, but merely the performance impossible. The words 'any cause beyond the control of either the sellers or the buyers preventing or delaying the carrying out of this agreement" do not include war, as they must be construed as meaning causes ejusdem generis with the preceding words: *Thorman* v. *Dowgate Steamship Co.* (1); *Northfield Steamship Co.* v. *Compagnie l'Union des Gaz.* (2) [*Matsoukis* v. *Priestman & Co.* (3) was also referred to.]

Compston, K.C., and *August Cohn*, for the defendants. During the war the agreement of 1908 is, by the operation of clause 17, entirely suspended. But, assuming that the operation of clause 17 is merely to suspend delivery of the concentrates during the war, the contract would still remain in force, because nothing would have to be done except adjustment of the accounts, and that would not involve trading with the enemy. The defendants are willing to consent to the plaintiffs selling concentrates during the war, so that there would be nothing contrary to the interests of

(1) [1910] 1 K. B. 410. (2) [1912] 1 K. B. 434.
(3) [1915] 1 K. B. 681.

Great Britain in the contract being suspended during that period. The contract is either not dissolved at all, or, if it involves trading with the enemy, it is only dissolved so far as trading with the enemy is concerned. If war prevents the further performance of part of the contract, there is no reason why it should prevent the performance of the rest of the contract. A contract for delivery by instalments stands upon a different footing from other contracts. The Court can eliminate the illegality and say that deliveries are to be resumed after the war as being perfectly legal. An executory contract is dissolved only if it must be performed during the war. Clause 3 of the contract of 1910 is a provision in the defendants' favour which they can waive, and in their defence they have offered to waive during the war the operation of the clause in respect of ore produced or to be produced during the war. At any rate, the agreement is severable as to that. The statement of Lord Lindley in *Janson* v. *Driefontein Consolidated Mines* (1) that war dissolves all contracts which involve trading with the enemy, which is the basis of all the recent decisions, was merely a dictum. In that case Lord Halsbury L.C. said (2) that "No contract or other transaction with a native of the country which afterwards goes to war is affected by the war. The remedy is indeed suspended: an alien enemy cannot sue in the Courts of either country while the war lasts; but the rights on the contract are unaffected, and when the war is over the remedy in the Courts of either is restored." That passage shows that the true rule is that war suspends a contract but does not dissolve it. War is included in clause 17. It is either force majeure or a cause beyond the control of the sellers or the buyers preventing or delaying the carrying out of the agreement. In the clause force majeure is mentioned as well as "acts of God," and therefore includes something more than vis major. It includes the intervention of human agency, preventing the carrying out of the contract. Force majeure was held by Bailhache J. in *Matsoukis* v. *Priestman & Co.* (3) to include the dislocation of a shipbuilding business owing to the great coal strike. War is also within the words "any cause beyond the control." In *Thorman* v. *Dowgate Steamship Co.* (4) and *Northfield Steamship*

(1) [1902] A. C. 484, 509.
(2) [1902] A. C. 493.
(3) [1915] 1 K. B. 681.
(4) [1910] 1 K. B. 410.

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Co. v. *Compagnie l'Union des Gaz* (1) the words were "any other cause." The fact that the word "other" is omitted in clause 17 shows that the intention of the parties was to exclude the ejusdem generis rule. [*Larsen* v. *Sylvester & Co.* (2) and *France, Fenwick & Co.* v. *Spackman & Sons* (3) were also referred to.]

Gore-Browne, K.C., replied.

Cur. adv. vult.

Sept. 7. The following judgment was read by

BRAY J., who, after stating the facts, continued: On these facts the plaintiffs contended that the outbreak of war rendered the further performance of the contract illegal and that it was dissolved. The defendants, on the other hand, contended that it was merely suspended during the continuance of the war, and they relied mainly on clause 17 of the contract of December, 1908. I think that apart from that clause the contract would be dissolved. I so held in a case before me in July last, where a similar question arose, on the authority of a case of *Wolf & Sons* v. *Carr, Parker & Co.* (4) in the Court of Appeal, not, I believe, yet reported. Lord Lindley in *Janson* v. *Driefontein Consolidated Mines* (5) stated the law thus: "War produces a state of things giving rise to well-known special rules. It prohibits all trading with the enemy except with the Royal licence, and dissolves all contracts which involve such trading." The passage in *Esposito* v. *Bowden* (6) relied on by Lord Lindley is as follows: "If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the Government of the country, the agreement is absolutely dissolved." I think there can be no doubt that that is the law. I think, further, that if the performance of any term of the agreement or the exercise of any right or option given by it be rendered unlawful the whole agreement is dissolved. The Court cannot substitute for the agreement made by the parties an agreement minus any one of its terms. The parties have never so agreed. It is not contended here that the agreement was severable. The defendants, however, contended that the effect of clause 17 was to

(1) [1912] 1 K. B. 434.
(2) [1908] A. C. 295.
(3) (1912) 18 Com. Cas. 52.
(4) [1915] W. N. 195.
(5) [1902] A. C. 484, 509.
(6) 7 E. & B. 763, 784.

provide that all trading and all occasion for commercial intercourse would be suspended during the war, and consequently nothing illegal would be done under the contract during the continuance of the war. The contract would be performed without any illegality on the part of either party, and, therefore, there would be no ground for its dissolution. I think this contention would be sound if it be clear that that is the true effect of clause 17. It becomes necessary, therefore, to consider clause 17. It is in these words: [The learned judge, having read the clause, continued:] Two points arise on the construction of this clause: (1.) Is war one of the causes on which the agreement is to be suspended? and (2.) What is the meaning of the words "this agreement shall be suspended"? I think both these are points of great difficulty, the difficulty which always arises when an event happens which was not contemplated by the parties when they entered into the agreement. I feel satisfied that if the parties had contemplated the outbreak of war between Great Britain and Germany they would have made special provision as to what was to happen. Nevertheless they may have used words wide enough to provide for this event, in which case they must be held to have intended to provide for it.

I will deal now with the first point. Apart from the general words, the only words among the specified causes for suspension which could include war are "force majeure." I do not think that those words are apt words for war, particularly having regard to the context. "Restraint of princes" is not to be found in the clause or any similar expression. I think if war is included it must be under the general words "or in the event of any cause beyond the control of either the sellers or the buyers." Is the rule ejusdem generis to apply? If it is not, these words are wide enough. Very little light on this question is to be found in the rest of the contract. There are, however, two considerations—firstly, there are no special provisions for the event of war such as one might have expected to find, and, secondly, there was no occasion to insert "war between Great Britain and Germany" as a cause for suspension, for, as a matter of law and without any special provision, it must cause at least suspension. The inclination of my opinion is that such a war is not included in this clause as a cause; but I prefer to base

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my opinion on the second ground taken by the plaintiffs, namely, that, assuming war to be included, the meaning of the words " this agreement shall be suspended " is that deliveries are to be suspended and that in other respects the provisions of the agreement are to be in operation, in which case something illegal might have to be done. I think the natural meaning of the words " this agreement shall be suspended " is that all the provisions of the agreement are to be suspended and that all rights and obligations of each of the parties are to cease during the continuance of the cause. Mr. Compston, however, for the defendants, admitted, and I think was bound to admit, that that could not be the meaning. It could not have been the intention of the parties, for instance, that the obligation for payment for ores already delivered should be suspended; but he contended that this and the necessary steps for arriving at the amount due were the only exceptions, and that this would involve no illegal act. The plaintiffs, on the other hand, relied upon many of the clauses of the agreement as containing provisions which equally the parties could not have intended to be suspended, and which would involve commercial intercourse. It is necessary to examine the whole of the agreement. As a result of this examination I have come to the conclusion that the plaintiffs' contention is correct, and that suspension of the agreement meant only suspension of deliveries. The end and object of the agreement was the sale and delivery by plaintiffs to defendants of a certain quantity of ores produced by the plaintiffs at Broken Hill.

[The learned judge then exhaustively examined the provisions of the agreement and held that upon its true construction the only suspension contemplated under it was the suspension of the deliveries of zinc concentrates, and that the right to give notices and the jurisdiction of arbitrators was not suspended; that it would be illegal for the plaintiffs to give such notices during the war; that the giving of such notices would constitute commercial intercourse, and would be the exercise of a privilege given to the plaintiffs by the contract and would be part and parcel of the contract. He finally came to the conclusion, though not without much doubt, that he must construe the words of clause 17 as providing only for suspension of deliveries of zinc concentrates, and that there would still remain things to be done, or rights to be exercised, which, after

the outbreak of war between Great Britain and Germany, would be illegal. The learned judge continued :]

I have not referred to the provisions of the contract of June, 1910, clause 3 of which was strongly relied upon by the plaintiffs. I think that in order to interpret clause 17 of the contract of 1908 that contract alone must be looked at. It results therefore, I think, that the contract was dissolved on August 4, 1914, and that the plaintiffs are entitled to a declaration to that effect. (1) No point was raised that the original company or its liquidator was not made a party. The declaration will not affect their rights. They have been finally released.

J. E. A.

The defendants appealed.

Nov. 18, 19; Dec. 15, 16. *Compston, K.C.*, and *August Cohn*, for the defendants.

Gore-Browne, K.C., and *F. Dodd*, for the plaintiffs.

The following additional authorities were referred to :—*The Hoop* (2); *Hadley* v. *Clarke* (3); *Antoine* v. *Morshead* (4); *S.S. Knutsford* v. *Tillmanns & Co.* (5); *Zinc Corporation* v. *Skipwith* (6); *Rex* v. *Kupfer* (7); *Sanday & Co.* v. *British and Foreign Marine Insurance Co.* (8); *The Panariellos* (9); *Miller & Co.* v. *Taylor & Co.* (10); *Kershaw* v. *Kelsey* (11); Y. B. 19 Edw. 4, H. T., fol. 6,

(1) The judgment as drawn up was (omitting formal parts) as follows : " It is this day adjudged and declared that the agreement dated the 4th April, 1912, ... be and the same was hereby dissolved as from 11 o'clock P.M. Greenwich time of the 4th August, 1914, by the existence of a state of war between Great Britain and Germany, and that the plaintiffs as from the said time were and are released and absolved from any obligation at any time to supply to the defendants or their assigns any zinc concentrates " ; but the declaration was without prejudice to the rights of either party in respect of concentrates supplied or which ought to have been supplied prior to the said time or to moneys paid to the special trust account mentioned in the agreement of December 14, 1908, or to any cause of action which had arisen prior to August 4, 1914

(2) (1799) 1 C. Rob. 196.

(3) (1799) 8 T. R. 259.

(4) (1815) 6 Taunt. 237.

(5) [1908] 2 K. B. 385; [1908] A. C. 406.

(6) (1914) 31 Times L. R. 106, 107.

(7) [1915] 2 K. B. 321, 338.

(8) [1915] 2 K. B. 781.

(9) (1915) 84 L. J. (P.) 140.

(10) (1915) 32 Times L. R. 161.

(11) (1868) 100 Mass. 561.

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pl. 6; 1 Rolle's Abr., p. 195, "Alien Enemie"; Trading with the Enemy Proclamation, No. 2, art. 5.

Cur. adv. vult.

Dec. 21. SWINFEN EADY L.J. read the following judgment:—This is an appeal by the defendants from the judgment of Bray J., who upon the trial of the action made a declaration that the agreement dated April 4, 1912, between the Zinc Corporation, Limited (Incorporated in Victoria), and Frank Charles Heley, the liquidator thereof, of the first part, the plaintiffs of the second part, and the defendants of the third part, was dissolved as from 11 o'clock P.M. Greenwich time on August 4, 1914, by the existence of a state of war between Great Britain and Germany. The said agreement is one whereby an earlier agreement dated December 14, 1908, as modified by an agreement dated June 20, 1910, was adopted and made binding upon the respective parties to this action, the previous company, the Zinc Corporation, Limited (Incorporated in Victoria), and its liquidator being released.

The defendants have contended on this appeal that the judgment was erroneous, and that the effect of the war was merely to suspend the operation of the agreement until the termination of the war and not to dissolve it. It is necessary first to determine what is the true construction of the agreement which is in dispute between the parties, and then to consider what is the effect of the war upon the contract as so construed.

The plaintiff company is engaged in obtaining ore from their mines at Broken Hill, Australia, and they treat that ore and other ore and concentrate the mixed products, which they sell as concentrates. The defendants are metal merchants and smelters and carry on their business at Halberstadt in Germany; they buy the plaintiffs' concentrates for the purpose of smelting. The defendants are alien enemies. By the contract of December 14, 1908, the predecessors of the plaintiffs agreed to sell to the defendants a quantity of 355,000 to 385,000 tons of zinc concentrates already produced or to be produced at Broken Hill. By the contract of June 20, 1910, varying and extending the previous contract, the company were to sell and the defendants were to purchase during each of the ten years 1910 to 1919, both inclusive, the whole of the

company's production of zinc concentrates, such production not to be less than 85,000 tons nor more than 95,000 tons in each year, and by clause 3 of the same agreement it was provided that so long as the agreement should be in force the company should not sell any zinc concentrates to any person, firm, or corporation other than the defendants.

The contract of April 4, 1912 (embodying the former contracts), was acted upon and carried out between the plaintiffs and defendants respectively until on or about August 1, 1914, when the defendants gave notice to the plaintiffs stopping all payments and advances for either ores or metals until further notice, and stopping all shipments to Europe of ores or metals. The defendants discontinued taking deliveries of zinc concentrates, by reason whereof the plaintiffs have been placed in a position of much difficulty. They cannot safely make forward contracts for delivery of their products elsewhere until their legal position has been determined, as if the contract with the defendants has been merely suspended during the duration of the war, and they are called upon, possibly at short notice, to resume deliveries to the defendants, they may run short of material if in the meantime they sell and deliver elsewhere. Moreover, the evidence shows that the plaintiffs may have difficulty in finding a market for their products, certainly if they are only able to guarantee delivery for an uncertain and indefinite period. Indeed the plaintiffs' difficulties have been such that they have ceased to produce ores since the commencement of the war.

The plaintiffs contend that the effect of the war is to put an end to and dissolve the contract. The defendants contend that the contract is merely suspended during the war and will again immediately become operative on the restoration of peace. The questions of construction involve the determination of the true meaning and effect of clause 17 of the agreement of 1908. That clause provides that in certain events the agreement shall be suspended. Is the happening of war an event included and provided for? The plaintiffs dispute and the defendants assert that it is. If it is, what is the meaning of the expression "then this agreement shall be suspended"? The defendants allege that it means the whole agreement is suspended. If so, is clause 3 of the agreement of 1910, precluding the plaintiffs from selling elsewhere,

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also suspended? And are they now at liberty to sell elsewhere? The plaintiffs allege that the expression means only that deliveries of ore are suspended, that the rest of the agreement remains in force, and if its provisions are observed necessitates intercourse with the enemy, and therefore that the agreement having become illegal, and so incapable of execution, is now void and at an end.

Although clause 17 does not appear to indicate that war was an event within the contemplation of the contracting parties, yet the language of the clause may be sufficient to cover it, and I assume in favour of the defendants that such is the case. The term "force majeure" as used on the Continent of Europe includes war: Calvo, Dictionnaire de Droit International, "Force Majeure"; Dalloz, Jurisprudence Générale, tome 24, p. 755, art. "Force Majeure"; Goirand's French Commercial Law, 2nd ed., p. 854. Whether the expression has the same meaning in this contract is another matter, but war is a cause beyond the control of either party preventing or delaying the carrying out of the agreement.

Then the question is, What is the meaning of the phrase "then this agreement shall be suspended"? The events mentioned in clause 17 upon which the agreement is to be suspended are numerous and extremely diverse in character; some may be of very short duration, and others may last for a long and indefinite period; some events (such as strikes or suspensions of labour) may prevent the plaintiffs from producing ore; some (such as scarcity of trucks for taking away concentrates) may prevent the defendants from taking delivery. But however trivial or important the delay occasioned by the event, upon its happening "then this agreement shall be suspended during the continuance of any and every such disability."

Having regard to the numerous and intricate provisions of the agreement, it seems quite unreasonable, and indeed extravagant, to suppose that the parties could have intended that a washaway of a railway, or a paucity of tramway trucks, temporarily interfering with production or delivery, should suspend the carrying out of the very elaborate provisions of the agreement for determining by assay the percentages of silver, zinc, and lead contained in ore previously delivered, or the reference to an arbitrator assayer, where the difference between the assays made by the respective

parties exceeded the limits specified, or the detailed procedure elaborated in the agreement for the purpose of calculating the ultimate price payable for ore already delivered, or the amount of the "returning charge" based upon the rise or fall in the price of spelter (ordinary brands) and upon the amount of the lead contents of the concentrates. Indeed, the argument that upon the happening of any event mentioned in clause 17 the whole agreement was suspended led manifestly to such absurd results that the defendants then contended that the true construction was that all the agreement was suspended except the portion of it relating to ore already delivered. It was said that the reason of the thing required this construction, although not definitely so expressed. But such a benevolent construction would not obviate all difficulty, having regard to other provisions of the agreement unconnected with ore already delivered, which it could not have been intended should be suspended. Thus by clause 2 of the agreement of 1910 the plaintiffs are to fix the quantity in excess of 85,000 tons, but not exceeding an additional 10,000 tons, to be produced and delivered in each year, and are to give notice to the defendants of the amount so fixed on or before April 30 in each year. It cannot be that, if by an accident in the last week of April and before the annual notice is given production or delivery of ore is suspended for, say, ten days, the agreement is thereby suspended and the plaintiffs in consequence unable to give the notice until on or before April 30 in the following year. This could not have been intended, as there would be no real connection between cause and result. Again, if by the happening of an event, within the meaning of clause 17, the plaintiffs should be prevented from producing a sufficient quantity of zinc concentrates to fulfil their contract, they were to be at liberty under clause 19 to acquire and tender to the defendants other zinc concentrates. If the whole agreement were suspended, this clause would be suspended, which is absurd, as it is only intended to come into operation when there is a suspension under clause 17. Again, by clause 3 of the agreement of 1910 the plaintiffs agree not to sell zinc concentrates to any persons other than the defendants while the agreement shall be in force. It could not have been intended that whenever the defendants were unable to take delivery for a few days, through some temporary

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interruption, the agreement should be suspended, the consequence of which would be that the plaintiffs could take advantage of the occasion and sell their whole accumulated stock elsewhere. Other clauses and events pointing to the same conclusion might be referred to.

Upon these grounds I am of opinion that it is not possible to give to the words occurring in clause 17, "this agreement shall be suspended," their natural and ordinary meaning, and that the words mean that deliveries under the contract are to be suspended.

The result of this construction is that the agreement does not contain a clause suspending its entire operation during the war, but it is to be read as if the clause merely suspended deliveries, leaving the rest of the contract subsisting between the parties to be performed according to its tenor. But to carry out during the war any part of the contract would involve intercourse with the enemy, and so would be illegal. Under clause 2 of the agreement of 1910 the notice is to be given before April 30 in each year. This notice regulates not only the yearly quantity but the monthly quantity, as delivery is to be given and taken in about equal monthly deliveries. Again, the notice exercising the option under clause 2 of the agreement of 1910 cannot be given. Again, under clause 6 of the agreement of 1910 notice is to be given before July 5 in the year following the year of delivery. (1) There are other clauses, including the arbitration clause, 21, of the agreement of 1908, all pointing to the necessity of intercourse, although deliveries may be suspended under clause 17, and thus rendering the further performance of the contract illegal. The result is that the outbreak of war has dissolved the contract between the parties so far as regards the future performance after August 4, 1914. The remedy of either side for what had previously been carried out remains in abeyance until the termination of the war: see *Esposito* v. *Bowden* (2); *Janson* v. *Driefontein Consolidated Mines* (3), per Lord Lindley.

There remains, however, another point of view from which the

(1) The notices here mentioned under clauses 2 and 6 of the agreement of 1910 were notices to be given by the defendants as to the exercise of an option in their favour.

(2) 7 E. & B. 779, 783.

(3) [1902] A. C. 509.

matter must be considered. The contract of 1910 not only provides that the defendants shall purchase the plaintiffs' whole production, but it also stipulates that the plaintiffs shall not sell their concentrates to any other person. This negative stipulation remains in force, according to the tenor of the agreement, as well during a war as during a temporary strike or accident or breakdown of machinery. Again, by clause 5 the defendants have the right to leave as much as 2200 tons of concentrates on the plaintiffs' floors and 800 tons in their vats at plaintiffs' risk for an indefinite period. Thus the position is that the defendants cannot take delivery, and yet, according to the contract, the plaintiffs cannot sell their production elsewhere, and must keep their floors and vats and other premises encumbered with concentrates which they are not permitted to dispose of, and thus the whole of this great industry must be brought to an entire standstill. I have in my mind and am fully aware of the letter of the defendants' solicitors of July 20, 1915 (1), but the rights of the parties must be considered with reference to their position under the agreement at the outbreak of war. Moreover, even if the plaintiffs were entitled to sell elsewhere any concentrates produced during the war, it might be a matter of extreme difficulty to the plaintiffs to do so to the best advantage if they are unable to enter into forward contracts for definite periods, and can only dispose of such concentrates as at the moment they have on hand, and with the risk of being called upon, possibly at short notice, to resume deliveries to the defendants. The effect of such an agreement as the present one, dealing with an important commercial product on a very large scale, is to prevent the resources of the country from being developed and labour from being employed, and the value of the mineral from being realized and the proceeds utilized in the best interest of the country. Moreover, the result of preserving intact for the defendants (as the agreement purports to do) all concentrates on the floors, in the vats, or otherwise made ready by the plaintiffs would be to protect the defendants' trade during the war and enable the defendants upon the

(1) This was a letter written by the defendants' solicitors to the plaintiffs' solicitors stating that "our clients would have no objection to agreeing that the concentrates produced during the war should be free for your clients to dispose of if that would end the question in this case."

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conclusion of peace to resume their trade as speedily and in as great volume as possible, and so to diminish the effect of war on the commercial prosperity of the enemy country, which it is the object of this country during the war to destroy. To recognize such a contract during war and to give effect to it by holding that it remained legally binding upon the contracting parties would be to defeat the object of this country in crippling the commerce of the enemy. "It would be to undo by means of British tribunals the work done for the British nation by its naval or military forces": per Lord Lindley in *Janson* v. *Driefontein Consolidated Mines*. (1) Such an agreement is, in my opinion, void as tending to assist the King's enemies. To carry out such an agreement during the war, and to withdraw goods from commerce and preserve them for the enemy after the war, is little removed from actually trading with the enemy. In *Furtado* v. *Rogers* (2) Lord Alvanley, in delivering the judgment of the Court of Common Pleas, said: "We are all of opinion that on the principles of the English law it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his own country; and that such a contract is as much prohibited as if it had been expressly forbidden by Act of Parliament."

Moreover, upon what ground can an agreement not to sell goods during the war be binding in favour of a person who has become an alien enemy? He cannot during the war enforce such an agreement. The true answer must be that the tie has become, not suspended, but dissolved by the war. In the case of *The Hoop* (3) Lord Stowell said: "In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a persona standi in judicio. . . . . A state in which contracts cannot be enforced, cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a Court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction; they have no legal existence; and the whole of such commerce is attempted without its protection

(1) [1902] A. C. 507. (2) 3 Bos. & P. 191, 198.
(3) 1 C. Rob. 196, 200.

and against its authority." This language is as applicable to the future performance of a contract entered into before the war as it is to entering into a contract during the war. The impossibility of enforcing it by an appeal to the law is the same in each case.

Much of the language used by Chancellor Kent in *Griswold* v. *Waddington* (1) (Court of Errors of New York) with reference to a contract of partnership, which he held was dissolved by war, is also applicable to the present case.

I am of opinion that the contract in question became dissolved on the outbreak of war and that the judgment below was right, and that this appeal fails.

PHILLIMORE L.J. read the following judgment:—This action is brought under the Act 5 Geo. 5, c. 36, for a declaration that an agreement dated April 4, 1912, and made between a Victorian company of the same name as the plaintiff corporation and its liquidator of the first part, the plaintiff corporation of the second part, and the defendants of the third part, was abrogated and avoided by the breaking out of war between Great Britain and Germany on August 4, 1914, and that the plaintiff corporation was and is released from any duty to supply the defendants with zinc concentrates or otherwise observe and perform the said agreement and two earlier agreements of December 14, 1908, and June 20, 1910, between the Victorian company and the defendants, the benefits and obligations of which were transferred to the plaintiff corporation by the agreement of April 4, 1912. Bray J., before whom the case was tried, has given judgment for the plaintiff corporation, and the defendants have appealed.

The agreement of December 14, 1908 (which I shall call the first agreement), provides for the sale by the Zinc Corporation of a large number of tons of zinc concentrates produced at Broken Hill in the State of New South Wales. It is modified by the agreement of June 20, 1910 (which I shall call the second agreement), and the joint effect of the two is as follows: The Zinc Corporation is to sell and the defendants are to buy in each of the ten years 1910 to 1919 the sellers' production of zinc concentrates at the rate of not less than 85,000 or more than 95,000 tons in each year. The sellers

(1) (1819) 16 Johnson, Sup. Ct. New York, 438.

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are to give notice on or before April 30 in each year of the exact quantity they propose to produce and deliver. The delivery is to be into railway trucks at the works. There are provisions in detail as to this delivery, as to intermediate storage, as to the percentage of spelter, silver, and lead, for payments on account with final adjustment, and in certain cases repayment, for weighing, sampling, and assaying, for arbitration on the assays, for fixing the varying prices of spelter, and for establishing a trust fund. There is a clause—15—in the first agreement enabling the sellers in the event of the price of spelter falling to a certain point to suspend the operation of the contract (which in this connection seems to mean suspend deliveries), but if they continue to produce they may be required by the buyers to continue to deliver. There are also clauses 17 and 18 in the first agreement, and 3 in the second agreement, which will require more detailed attention.

The defendants being German subjects, this is an agreement which cannot continue to be performed during the war. I do not think there is any doubt about this. It would involve commercial intercourse with the enemy, which is unquestionably unlawful: *The Hoop* (1); *Esposito* v. *Bowden* (2); *Furtado* v. *Rogers* (3); *Janson* v. *Driefontein Consolidated Mines* (4); *Robson* v. *Premier Oil and Pipe Line Co.* (5), and numerous other cases, English and American. The American cases up to that date are collected in *Kershaw* v. *Kelsey.* (6)

This agreement being incapable of continued performance during the war, "the end of which cannot be foreseen" (*Esposito* v. *Bowden* (7)), is prima facie dissolved, abrogated, or avoided by the war: see *Esposito* v. *Bowden* (8) and other cases. But it is said for the defendants that this which would be the general rule is not applicable to this case, because the parties have made provision for this event, and have provided for the suspension or putting to sleep of the agreement during war between the two countries, or for the postponement of its execution till peace returns. For this purpose clause 17 of the first agreement is relied on. [The

(1) 1 C. Rob. 196.
(2) 7 E. & B. 763.
(3) 3 Bos. & P. 191.
(4) [1902] A. C. 484.
(5) [1915] 2 Ch. 124.
(6) 100 Mass. 561.
(7) 7 E. & B. 792.
(8) Ibid. 783.

Lord Justice read the clause.] It is said that either the words "force majeure" or the words "any cause beyond the control of either the sellers or the buyers preventing or delaying the carrying out of this agreement" introduce and cover the following cause, "war between Great Britain and Germany," and that the agreement is suspended (whatever that may mean) during the war. I will assume that this may be so, and I will assume that a provision that in the event of war between the two nations the execution of the contract shall be suspended or postponed till peace returns can be lawfully made. But do the parties by this clause mean suspension of the agreement or only suspension of the duty of making or taking delivery, as the case may be, with the further suspension, if deliveries are suspended, of the duty of producing? The defendants contend that the whole agreement is suspended. Again in their favour I put aside the almost metaphysical objection that if the whole agreement is suspended the clause suspending it is also suspended. Is it possible to say that the words in clause 17 mean that the whole agreement is suspended, or even that every operative clause in the agreement is suspended? Let us look at some of the causes. Strikes may be long or short. War is of indefinite length. Floods and storms are short, but their consequences might perhaps last long. Stoppage of water supply, washaways of railways, breakdown of machinery, or inability to provide trucks are the most temporary incidents. Are all the elaborate provisions as to payment for past deliveries or repayment of overpayments to be suspended because there is a washaway? May the sellers sell to others during this period? There is the date in clause 2 of the second agreement on or before which the sellers are to give notice of the quantity they intend to produce and deliver during the year. If they wait, as they lawfully may, till April 30, and a strike broke out on the 28th and continued for a week, have they lost their right or not performed their duty of giving notice, and is the quantity to remain unfixed for the year? In the same clause there is an option to be declared not later than February 15, to which the same observations apply. These considerations make it difficult to hold that the words "this agreement shall be suspended" in clause 17 mean that the agreement or that every operative clause in the agreement is suspended.

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There are other reasons. The not dissimilar words "suspend the operation of this contract" occur in clause 15 of the first agreement, and it seems pretty clear that there they only mean suspend delivery. In clause 18, following on 17, it is said that "in the event of suspension of deliveries from any of the causes set out in clause 15 or 17" certain provisions for extending the period of the agreement and for making up the quantity short delivered shall come into operation. But where has suspension of deliveries been mentioned in clauses 15 and 17 if the defendants' contention be correct? And if it be said that the whole agreement has been suspended, and therefore the deliveries as a part of the operation, then how can clause 18 be in force? It has been suspended too. Clause 19 is clearly intended to be in force, although the deliveries are suspended.

I come, therefore, to the conclusion that clause 17 only provides for the suspension of deliveries and as incidental thereto of the duty of production, and not for suspension or postponement of the whole contract or of all the reciprocal duties under it. If this conclusion is reached the agreement cannot remain in force. It might perhaps be enough to say that it fell under the general rule expressed in *Esposito* v. *Bowden*. (1) One might rely also upon the provision in clause 18 for storing up the metal for the enemy hereafter, as to which see the observations of Lord Alvanley in *Furtado* v. *Rogers*. (2) But there is a more serious objection in clause 3 of the second agreement: "The sellers shall not so long as this agreement shall be in force sell any zinc concentrates to any person or persons firm or firms or corporation or corporations other than the buyers." By this clause the British subject is prevented from using his resources—and how important these particular resources are the facts in the case show—for the benefit of his country. The enemy is allowed to tie his hands during the period of the war. If "any act or contract which tends to increase the resources of the enemy" is unlawful, as was said in *Kershaw* v. *Kelsey* (3), similarly any act or contract with the enemy which tends to diminish the resources of one's own country must be equally unlawful. If, therefore, one of the causes of suspension under clause 17 is war between Great

(1) 7 E. & B. 763. (2) 3 Bos. & P. 199, 200.
(3) 100 Mass. 573.

Britain and Germany, the agreement would be an unlawful one. If, however, as seems reasonable, we are to construe the agreement ut res magis valeat quam pereat, we shall not admit this as one of the causes of suspension; and in that case the parties have not provided for the contingency of this war, and the ordinary rule prevails. The agreement has become incapable of performance by reason of the outbreak of war and has been dissolved.

I think that the judgment of Bray J. is right and that this appeal should be dismissed.

PICKFORD L.J. read the following judgment:—I agree that this appeal fails.

I do not intend to set out the facts or the provisions of the agreement in detail. They have been sufficiently dealt with in the judgments of Bray J. and the other members of this Court. I agree with Bray J. that, apart from the operation of clause 17 of the agreement of December 14, 1908, this contract would be dissolved as the carrying of it out would involve a trading with the enemy. But the defendants contend that the effect of clause 17 is to suspend the whole contract during the continuance of the war and by so doing avoid any unlawful intercourse with the enemy, leaving the contract in existence, though suspended, and after the end of the war binding on both parties. This argument depends on two matters: (1.) Is war an exception within clause 17? (2.) Is the whole operation of the agreement suspended by that clause or only the performance by way of delivery? For the purposes of this judgment I shall assume, without deciding, that war is an exception within clause 17. But on that assumption I do not think the effect of the clause is to suspend and so for the time being put an end to the whole contract. The extent of the suspension must be the same in the case of all the excepted causes, and I think it is inconsistent with the terms of the contract that in all those cases the operation of all its terms is for the time at an end. I agree, therefore, with the decision of Bray J. that the suspension of the agreement means only suspension of deliveries and that the other terms of the contract remain in force.

I propose to rest my judgment on one of those terms, clause 3 of the agreement of June 20, 1910. The effect of that clause is to

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prevent the sale by the plaintiffs of any part of their concentrates during the continuance of the war. They cannot sell to the defendants, because that would be trading with the enemy, and they cannot sell to any one else, because to do so would be a violation of the terms of their contract. There is, therefore, a restriction, by reason of a contract existing between them and an alien enemy, upon the free exercise by British subjects of their right to deal in the merchandise produced by them, in this case a very appreciable proportion of the total production of what may be a very valuable article to this country. This seems to me to be a relation between a British subject and an alien enemy of a nature which is contrary to public policy, because it is calculated to be of detriment to the interests of this country and of assistance to the King's enemies: see per Lord Halsbury in *Janson* v. *Driefontein Consolidated Mines* (1), where he says: "In treating of various branches of the law learned persons have analysed the sources of the law, and have sometimes expressed their opinion that such and such a provision is bad because it is contrary to public policy; but I deny that any Court can invent a new head of public policy; so a contract for marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract, or, what is relevant here, the assisting of the King's enemies, are all undoubtedly unlawful things; and you may say that it is because they are contrary to public policy they are unlawful; but it is because these things have been either enacted or assumed to be by the common law unlawful, and not because a judge or Court have a right to declare that such and such things are in his or their view contrary to public policy." It is also, if it be necessary to consider the matter, a relation of a commercial nature. I do not think that it is material that the agreement contained in clause 3 was valid at the time it was made. As soon as the war began the defendants became alien enemies and the relation between them and the plaintiffs, before that perfectly valid, became invalid. It seems to me that the case is exactly within the words of Lord Tenterden in his work on Shipping, 5th ed., p. 427, quoted with approval by Willes J. when delivering the judgment of the Exchequer Chamber in *Esposito* v. *Bowden* (2): "If an agree-

(1) [1902] A. C. 491. (2) 7 E. & B. 784.

ment be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the Government of the country, the agreement is absolutely dissolved." It was argued before us that this only relates to the particular description of contract under consideration in that case, but I can see no difference in principle between that contract and any other, and I can see no difference in principle between an agreement to do an act by a British subject and an agreement imposing a restriction upon a British subject in favour of an alien enemy. This was the view taken by the Exchequer Chamber in *Esposito* v. *Bowden*, where Willes J. a little later on the same page says: "It may be added that the cases above put by Lord Tenterden cannot be treated as isolated propositions, but as instances of the general principle of law with which they are prefaced." I do not in any way dissent from the conclusion that the existence of the unsuspended terms of the agreement would involve trading with the enemy, but in the view I take of the effect of clause 3 I have not thought it necessary to consider that matter in detail.

Appeal dismissed.

Solicitors for plaintiffs: *Birkbeck, Yeo & Co.*
Solicitors for defendants: *William A. Crump & Son.*

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[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

H. DAKIN & CO., LIMITED *v.* LEE.

[1914 H. 381.]

Contract—Lump Sum—Work not completed—Abandonment of Contract—Right to sue on Quantum Meruit.

Where a builder has supplied work and labour for the erection or repair of a house under a lump sum contract, but has departed from the terms of the contract, he is entitled to recover for his services, unless (1.) the work that he has done has been of no benefit to the owner; (2.) the work he has done is entirely different from the work which he has contracted to do; or (3.) he has abandoned the work and left it unfinished.

Decision of Divisional Court (Ridley and Sankey JJ.) affirmed.

APPEAL of the plaintiffs from the judgment of Mr. Muir Mackenzie, official referee.

The plaintiffs were builders. The action was brought to recover the sum of 352*l.* 4*s.* 4*d.*, the balance of the price of certain repairs carried out by the plaintiffs at the defendant's house, 37, Wimbledon Park Road, Wandsworth. Part of the claim related to work contained in a specification which by a verbal contract the parties had agreed should be done for 264*l.* The balance of the claim was for extras and additional work. The only question raised on the appeal related to the claim in respect of the contract work.

The defence was that the work referred to in the specification had not been completed, and the official referee found as a fact that the contract had not been fulfilled in the three following instances:—(1.) A letter from the plaintiffs which accompanied the specification stated that the concrete which was to be placed under a part of one of the side walls of the house, which was to be underpinned, was to be of the depth of 4 feet. Only 2 feet of concrete was placed there. (2.) Columns of hollow iron, 5 inches in diameter, were to be used for the support of a certain bay window. The columns supplied were of solid iron 4 inches in diameter. (3.) The joists over the bay window were to be cleated at the angles and bolted to caps and to each other. This was not done. The defendant

had resumed her occupation of the house after the plaintiffs' workmen had left, and after receiving the plaintiffs' account she offered to settle the whole claim by a payment of 250*l.* in addition to a sum of 50*l.* which she had already paid.

The official referee held that the plaintiffs had not performed their contract, in that the defendant had been given something different from, and less strong and secure than, what she was entitled to have under the contract, and that the plaintiffs were therefore not entitled to recover any part of the contract price or any sum in respect of the contract work. The official referee disallowed the claim for extras, but allowed a sum of 70*l.* for the additional work, which was less than the sums paid before action and paid into Court, and the official referee therefore entered judgment for the defendant.

The plaintiffs appealed.

Bromley Eames, for the plaintiffs. The result of the judgment of the official referee is that, although the plaintiffs have carried out their contract except in three unimportant particulars, the defendant gets the benefit of the work which has been done without paying anything for it. The authorities show that a builder who has been working under a contract which he has not carried out in its entirety is nevertheless entitled to recover on a quantum meruit, unless either the work done is useless to the building owner or is in the result something quite different from that which was contracted for, or unless the builder has himself abandoned the contract and refused to complete the work: *Farnsworth* v. *Garrard* (1); *Thornton* v. *Place* (2); *Chapel* v. *Hickes*. (3) The facts of this case do not bring it within either of those categories. The decision in *Ellis* v. *Hamlen* (4), which at first sight seems opposed to the plaintiffs' contention, really turned on the point that the defendant had not acquiesced in the deviations from the contract: see *Burn* v. *Miller*. (5) The sum which the plaintiffs are entitled to recover is the contract price less the cost of completing the work in accordance with the contract. In the case of work which cannot now be

(1) (1807) 1 Camp. 38.
(2) (1832) 1 Moo. & R. 218.
(3) (1833) 2 C. & M. 214.
(4) (1810) 3 Taunt. 52.
(5) (1813) 4 Taunt. 745.

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altered there must be a disallowance of the profit on that part of the work: *Stegmann* v. *O'Connor*. (1) [*Munro* v. *Butt* (2), *Lovelock* v. *King* (3), *Mondel* v. *Steel* (4), *London School Board* v. *Wall* (5), and *Whitaker* v. *Dunn* (6) were also referred to.]

J. D. Cassels and *B. L. A. O'Malley*, for the defendant. The plaintiffs are suing on a contract by which they agreed to do certain specified work for a certain sum. It is admitted that in some respects the work has either not been completed or has not been carried out in accordance with the contract. In these circumstances the plaintiffs cannot recover anything: *Appleby* v. *Myers*. (7) They cannot recover the contract price because they have not carried out the contract. They cannot recover on a quantum meruit unless there was a fresh contract to pay for the work actually done: *Munro* v. *Butt* (2); *Sumpter* v. *Hedges*. (8) It is not suggested that any new contract was expressly made, and the fact that the defendant has been living in the house is not evidence from which a contract to pay for the work can be implied: *Forman & Co. Proprietary* v. *Ship Liddesdale*. (9) The deviations from the contract were of a serious character, particularly in regard to the concrete foundation: *London School Board* v. *Wall*. (5) [*Lucas* v. *Godwin* (10), *Craven* v. *Tickell* (11), *Williams* v. *Fitzmaurice* (12), *Wilkinson* v. *Clements* (13), and *Sinclair* v. *Bowles* (14) were also referred to.]

Bromley Eames in reply. This Court is not bound by the official referee's findings of fact: *Wynne-Finch* v. *Chaytor*. (15)

RIDLEY J. In my opinion the decision of the official referee cannot be supported. The plaintiffs entered into a contract with the defendant to execute certain repairs at her house in accordance with a specification for the sum of 264*l*. 2*s*. 10*d*. It is said, and the official referee has held, that because in respect of three small matters the work was not carried out in

(1) (1899) 81 L. T. 627.
(2) (1858) 8 E. & B. 738.
(3) (1831) 1 Moo. & R. 60.
(4) (1841) 8 M. & W. 858.
(5) (1890) Hudson's Building Contracts, 3rd ed., vol. 2, p. 165.
(6) (1887) 3 Times L. R. 602.
(7) (1867) L. R. 2 C. P. 651.
(8) [1898] 1 Q. B. 673.
(9) [1900] A. C. 190.
(10) (1837) 3 Bing. N. C. 737.
(11) (1789) 1 Ves. Jun. 60.
(12) (1858) 3 H. & N. 844.
(13) (1872) L. R. 8 Ch. 96.
(14) (1829) 9 B. & C. 92.
(15) [1903] 2 Ch. 475.

accordance with the specification the plaintiffs are not entitled to recover any part of the contract price. The work was in my opinion substantially completed, and the defendant has had the benefit of it, for she has been living in the house ever since the repairs were finished. But it is contended that the authorities compel us to hold that the defendant, who has got the benefit of all the work that was done, is not liable to pay anything for it because in those respects the contract has not been absolutely complied with. If that were the law we should be bound to follow it, however much one might regret having to do so, for I think it would be productive of very great injustice.

It seems to me, however, from the authorities that where a building or repairing contract has been substantially completed, although not absolutely, the person who gets the benefit of the work which has been done under the contract must pay for that benefit. On the other hand, if the builder has refused to complete his work, or if the work done is of no use to the other party, or if the work is something entirely different from what was contracted for, then the builder can recover nothing. In the present case the work was in my opinion, as I have said, substantially completed. It was not entirely different from what had been contracted for, and it was certainly of use to the defendant, as is shown by the fact that, as appears from the correspondence, she was willing to pay 250*l.* for it.

The first case to which I wish to refer, and which I take as the foundation of my judgment, is *Farnsworth* v. *Garrard.* (1) In that case Lord Ellenborough stated what in his opinion was the proper course to be pursued in cases similar to the present. He said: "This action is founded on a claim for meritorious service." The claim was for work and labour done and materials found, with the common counts. "The plaintiff is to recover what he deserves. It is therefore to be considered how much he deserves, or if he deserves anything. If the defendant has derived no benefit from his services, he deserves nothing, and there must be a verdict against him. There was formerly considerable doubt upon this point. The late Buller J. thought, (and I, in deference to so great an authority, have at times ruled the same way) that in cases of this

(1) 1 Camp. 38.

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kind, a cross action for the negligence was necessary, but that if the work be done, the plaintiff must recover for it." There was no suggestion that the plaintiff was to recover nothing; the suggestion was that Buller J. thought that the plaintiff should recover the whole amount, leaving the defendant to sue him in an action for negligence. But Lord Ellenborough adopted what seems to me a more just rule, for he went on to say: "I have since had a conference with the judges on the subject; and I now consider this as the correct rule, that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence. The claim shall be co-extensive with the benefit." That is, I believe, the general rule which has been accepted ever since. There has been one decision, to which I will refer, which seems to be otherwise, but which has, I think, been altered by subsequent decisions, and with that exception all the cases seem to carry out the same point of view. It is not correct to say that there must be evidence of another contract to pay for the work as done; there is not a word about another contract in the judgment of Lord Ellenborough when laying down the principle in *Farnsworth* v. *Garrard* (1), and I do not think any authority for that suggestion can be found. The principle is that the builder is to recover what he deserves for the work which he has done. If any question of a new contract arises at all, it is because it is to be implied from the fact that the owner of the building has had the benefit of the work or has expressed his willingness to pay for it.

I pass now to the case of *Thornton* v. *Place* (2), which was decided in 1832, that is, twenty-five years after *Farnsworth* v. *Garrard*. (1) In that case there was a contract to do certain work for a lump sum. The action was brought to recover a balance of account. Parke J. in charging the jury said: "When a party engages to do certain work on certain specified terms, and in a certain specified manner,—but, in fact, does not perform the work so as to correspond with the specification,—he is not, of course, entitled to recover the price agreed upon in the specification; nor can he recover according to the actual value of the

(1) 1 Camp. 38. (2) 1 Moo. & R. 218, 219.

work, as if there had been no special contract. What the plaintiff is entitled to recover is the price agreed upon in the specification, subject to a deduction; and the measure of that deduction is the sum which it would take to alter the work, so as to make it correspond with the specification." That is a rider upon *Farnsworth* v. *Garrard* (1), I think, in this sense, that where there is a contract to do the work for a fixed sum you are not simply to measure and value the work actually done; the proper course is to deduct from the contract price the cost of the work which has not been done.

The next case to which I wish to refer is *Ellis* v. *Hamlen* (2), and it is the case which I have already mentioned as not being consistent with *Farnsworth* v. *Garrard*. (1) It is also contrary to *Thornton* v. *Place* (3), but as it was decided more than twenty years before *Thornton* v. *Place* (3) it must have been within the knowledge of the learned judge who tried that case. In *Ellis* v. *Hamlen* (2) an action was brought by a builder, who had contracted to build a house of certain specified materials and dimensions, to recover the balance of the agreed price. It appeared in the course of the trial that the plaintiff had omitted to supply certain joists and other materials of the stipulated description and measurement. The report states that "the counsel for the plaintiff proceeded to inquire of the witnesses what additional sum must be expended on the house to make it equal in value to that which was specified in the contract, contending that the plaintiff was entitled to recover in this action the whole sum which was specified in the contract, excepting thereout the amount of this difference in value, which, they said, would be the measure of damages, if an action had been brought on the contract by the employer against the builder for not performing his contract; and that if the sums which had already been paid to the plaintiff on account did not amount to the whole price specified in the contract, deducting therefrom the amount of the before-mentioned difference in value, the plaintiff was entitled to a verdict for the residue minus that difference. Mansfield C.J. was of opinion that the plaintiff, not having performed the agreement he had proved, must be non-suited. The

(1) 1 Camp. 38. (2) 3 Taunt. 52, 53.
(3) 1 Moo. & R. 218, 219.

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plaintiff's counsel then resorted to a count which they found in the declaration, for work, labour, and materials, upon a quantum valebant, and said, that the plaintiff" (this is obviously a mistake for defendant) "having the benefit of the houses, was bound at least to pay for them according to their value," but Mansfield C.J. held that the plaintiff was not entitled to recover under that head of his claim. It does not appear that the difference between the count for work and labour and the count on the special agreement for a sum fixed was referred to, nor was there any discussion as to whether it would make a difference if the work was substantially completed. The decision was that a plaintiff in a case of that sort cannot recover anything unless he shows that the contract has been completely performed. I am unable to follow that case, because it seems to me not to be in accordance with the other decisions. The next case to which I wish to refer is *Cutler* v. *Close* (1), decided in 1832, and therefore twenty-two years after *Ellis* v. *Hamlen* (2) and in the same year as *Thornton* v. *Place*. (3) It was an action to recover 70*l*. on a contract for providing and erecting a warm-air stove and apparatus in a chapel. On the part of the defendant it was said that the work had been executed in an imperfect manner and that it could not be said to have been completed in such a way as to satisfy the trustees of the chapel. It was argued for the plaintiffs that if the work had been done improperly the defendant might bring a cross-action against the plaintiffs; but that if he had derived any advantage from it he must pay the price. That is exactly the contrary of what had been said in *Ellis* v. *Hamlen*. (2) Tindal C.J. in summing up to the jury in *Cutler* v. *Close* (1) said: "The law on the subject, as it seems to me, lies in a narrow compass. If the stove in question is altogether incompetent and unfit for the purpose, and, either from that or from the situation in which it is placed, does not at all answer the end for which it was intended, then the defendant is not bound to pay. If it is perfect, and the fault lies in mismanagement at the chapel, then the plaintiffs will be entitled to recover the whole price. But there is another view of the case. The apparatus may be in the main substantial, but not quite so complete as it might be according to the contract; and,

(1) (1832) 5 C. & P. 337, 338. (2) 3 Taunt. 52.
(3) 1 Moo. & R. 218.

in that case, if it can be made good at a reasonable expense, the proper course will be to give your verdict for the plaintiffs, deducting such sum as will enable the defendant to do that which is requisite to make it complete." That exposition of the law appears to me to be exactly applicable to this case.

Stegmann v. *O'Connor* (1) was a case in which a decision of Bruce J. and myself was affirmed by the Court of Appeal. (2) It is an instance of a case in which the work was entirely useless, and therefore we held that nothing was recoverable. In view of the argument which has been addressed to us by counsel for the defendant I also refer to *Lucas* v. *Godwin* (3), which is important as showing that Tindal C.J. adhered to the view which he had expressed in *Cutler* v. *Close*. (4) It was a case in which the contract had not been completely performed. Tindal C.J. said: "I think the plaintiff was entitled to sue on the general counts. In all such cases a plaintiff is entitled to do so unless there be something express and explicit in the contract to shew a condition which goes to the whole right of action. I see none such here. If it be said that the condition that the work shall be done in a proper and workmanlike manner, is of that nature, that is a condition which is implied in every contract of the same kind; and if it were a condition precedent to the plaintiff's remuneration, a little deficiency of any sort would put an end to the contract, and deprive a plaintiff of any claim for payment: but under such circumstances, it has always been held that where the contract has been executed, a jury may say what the plaintiff really deserves to have." I think that applies to this case because this contract has also been executed.

I have now, I think, expressed sufficiently my view of the law applicable to this case. I understand that counsel for the defendant contend that it was for the official referee to say whether or no the contract had been substantially executed in this case. I think otherwise. I think there was no evidence on which he was entitled to find in this case that it had not been executed. In my opinion the contract had been executed within the meaning that has been given to those words in the previous decisions, although there were some few small details or matters which required to be put right.

(1) 80 L. T. 234.
(2) 81 L. T. 627.
(3) 3 Bing. N. C. 737, 743.
(4) 5 C. & P. 337, 338.

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The case of *Forman & Co. Proprietary* v. *Ship Liddesdale* (1), which was relied on by counsel for the defendant, seems to me to be of quite a different nature. The repairs to the ship had been so done as to entirely alter the original character of the ship, and the case therefore falls within one of the categories in respect of which the action would not be allowed to be maintained. I think I ought to add with regard to *Appleby* v. *Myers* (2), which was a case upon a different state of facts altogether, that I think the statement made by Blackburn J. in that case, which is relied upon by the defendant in this case, although I should not think of questioning it for a single moment, was not intended to be an exclusive and complete statement of the law relating to claims under contracts which have been practically, although not completely, performed. In my opinion it is not correct to say that there must always be a new contract in order to render the building owner liable in such a case.

For these reasons I think this decision must be reversed, and, as the value of the work has been found by the learned referee, I think it would be better to adopt his figure in order to avoid the necessity for a new trial.

SANKEY J. I agree. I do not think that the official referee took the correct view of either the law or the facts. In my opinion the law applicable to cases of this sort is as follows. Where a builder has supplied work and labour for the erection or repair of a house under a lump sum contract, but has departed from the terms of the contract, he is entitled to recover for his services, unless (1.) the work that he has done has been of no benefit to the owner; (2.) the work he has done is entirely different from the work which he has contracted to do; or (3.) he has abandoned the work and left it unfinished.

As to the first case, namely, where the work as done is of no benefit to the owner, the authority is *Farnsworth* v. *Garrard.* (3) An illustration of the second case, where the work done is entirely different from the work which the builder contracted to do, may be found, I think, in the case of *Forman & Co. Proprietary* v. *Ship*

(1) [1900] A. C. 190. (2) L. R. 2 C. P. 651.
(3) 1 Camp. 38.

Liddesdale. (1) The gist of the decision is given where Lord Hobhouse says : " It is also made clear that the substitution of iron for steel not only added to the weight and to the expense, but altered the structure of the vessel—to her advantage, as the plaintiffs contend, but, as the defendant says, causing a rigidity in her framework which is a source of danger to her. That is a matter on which opinions vary ; but there is no dispute that the alteration is not consistent with the plaintiffs' obligation to restore the vessel to her original condition prior to the accident."

Another illustration of the same class of case, namely, where the work done is entirely different from the work contracted to be done, may be found in the observations of Day J. in *London School Board* v. *Wall*. (2) A similar rule applies in the sale of goods, where the plaintiff cannot recover if he supplies an article entirely different from that which he has contracted to supply.

With regard to the third case, namely, where the builder has abandoned the work or left the house or the repairs unfinished, the authority is *Sumpter* v. *Hedges*. (3) There the plaintiff had abandoned the work and left it incomplete. Mr. Cassels in the course of his argument put by way of illustration the case of a builder who, having contracted to build a 10-foot wall, built a wall of 2 feet only, and he contended that in that case the builder could not recover. In my opinion that would come into the third category of cases which I have mentioned ; the builder would be held not to have finished the work and to have abandoned it. I do not think it is necessary to go through all the cases on this third point. There is an old case of *Sinclair* v. *Bowles* (4), which is a similar case ; there the contract was by the plaintiff to complete a chandelier for a particular sum, and the jury found that the contract had not been performed. Another similar case, though on a different branch of the law, is *Cutter* v. *Powell* (5), where the deceased man had not performed his contract to act as mate of a vessel on a voyage from Jamaica to Liverpool, and it was held that his executor could not recover.

(1) [1900] A. C. 190, 201.

(2) Hudson's Building Contracts, 3rd ed., vol. 2, p. 165.

(3) [1898] 1 Q. B. 673.

(4) 9 B. & C. 92.

(5) (1795) 6 T. R. 320; 2 Sm. L. C. 1.

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But then it is said that the first contract, not having been performed, has gone, and that there is no evidence of any new contract by the defendant to pay for the work that was actually done. She says that no promise to pay for that work can be implied from the fact that the defendant occupied the house because the work was carried out on the employer's land, and therefore could not be rejected. I think there is a fallacy underlying that argument. I do not think that the contract can be said to have gone where the house has been substantially completed or the repairs have been substantially carried out, though not entirely in the manner provided for by the contract. The true view and the true method of ascertaining the amount due to the plaintiff in such a case is, I think, that given by Parke B. in the case of *Thornton* v. *Place* (1) where he says: "What the plaintiff is entitled to recover is the price agreed upon in the specification, subject to a deduction; and the measure of that deduction is the sum which it would take to alter the work, so as to make it correspond with the specification." Where repairs have been substantially completed, or a house has been substantially erected, in accordance with the contract I find no difficulty in holding either that the contract has been performed, or that there is an implied request by the defendant to do the work and an implied promise to pay. I cannot hold that, where a builder has done ninety-nine hundredths of the work according to the contract and the remaining one hundredth in a different way, the building owner is not in law obliged to pay for any part of the work done. The present case, in my view, is an example of that. Unfortunately, we have not the advantage of hearing exactly what the learned referee said when he gave his judgment, but I am satisfied that there was no finding by him that the work done by the plaintiffs was of no benefit to the defendant, or that it was entirely different from that which the plaintiffs contracted to do, and there is no finding that they either abandoned the work or left the repairs unfinished. I do not think there is any evidence—certainly our attention has not been drawn to it—to show that the contract has not been substantially completed, and I do not think that because there was a slight variation in the depth of the concrete, a very insignificant variation in the columns, and a still more insignificant

(1) 1 Moo. & R. 218, 219.

variation in the beams by their not being cleated, it is possible to say that the repairs have not been substantially done.

Under these circumstances, I think the judgment of the learned official referee was wrong, and that this appeal ought to be allowed.

Appeal allowed.

F. O. R.

The defendant appealed.

1915. July 6. *W. E. Hume Williams, K.C., J. D. Cassels*, and *B. L. A. O'Malley*, for the appellant, made use of the same arguments as in the Court below, and referred to the same authorities. They did not dispute the law laid down by the Divisional Court, but the application of it.

Bromley Eames, for the respondents, was not called upon to argue.

LORD COZENS-HARDY M.R. This is an appeal from a decision of the Divisional Court reversing the finding of the official referee in a dispute between builders and a building owner. The building owner was a lady who was engaged in school work, and whose house required certain alterations and improvements.

A specification was prepared in August, 1913, by which the builders agreed to do a great deal. They were to examine the roof and renew the decayed parts of it and the gutter pipes, to repair the gutters and rainwater pipes in the roof over the conservatory, to examine the main roof, to underpin, where necessary, the piers and walls of the conservatory, and rebuild any portions where found necessary, to repair or renew the wood staircase, to take down the bay window and rebuild it, to reconstruct the arches over the first and second floor windows, to alter the porch roof, to repair the basement area window, to cut out the cracks in the flank wall, to excavate as required and underpin the flank wall and chimney breasts with solid Portland cement concrete base, the concrete underpinning to be composed of one part of Portland cement concrete to six parts of clean Thames ballast, to test and examine the drains, to take down the brick arches in the back elevation, to alter the front gate, and to do a number of other things. It will be observed

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that one of the matters which is mentioned more than once is the underpinning of a wall, which was to be done with solid Portland cement concrete base. The work was finished—and when I say this I do not wish to prejudice matters, but I cannot think of a better word to use at the moment.

There were then disputes, as I have said, between the building owner and the builders. An action was commenced by the builders and referred to the official referee, and the official referee heard arguments extending over some seven or eight days, and he went twice to look at the house. He has made a finding to the effect that the obligation on the plaintiffs was to put down concrete 4 feet in depth throughout the part to be underpinned; I am not quite sure whether that is true. There is, in the specification itself, no clause binding them to put concrete to the depth of 4 feet. It is true that, in the letter of even date which enclosed the estimate for doing the work comprised in the specification, it is said that the estimate was on the basis of concrete being 4 feet deep; but there is not an express contract that the concrete should be of that depth. However, the official referee has found that the plaintiffs were under the obligation to put down 4 feet of concrete, and the builders swore at the trial that 4 feet of concrete had in fact been put in. The official referee went to the house on two occasions and tested it, and he has found as a fact "that in no parts was there the contract depth, 1 foot 7 inches to 2 feet was the average depth." He also said "It is immaterial that the plaintiffs considered and that the defendant considered the depth to be safe." He has also found that the builders put in two solid columns 4 inches in diameter when, according to the specification, they were to be 5 inches in diameter, hollow; but that is a trivial matter, and so trivial that I do not propose to say another word about it. He then says that certain rolled steel joists ought to have been bolted to caps and to each other, and that this was quite ignored. That may or may not have been a matter of importance. Lastly, he finds that the concrete was not properly mixed.

In these circumstances it has been argued before us that, in a contract of this kind to do work for a lump sum, the defect in some of the items in the specification, or the failure to do every item contained in the specification, puts an end to the whole contract,

and prevents the builders from making any claim upon it; and therefore, where there is no ground for presuming any fresh contract, he cannot obtain any payment. The matter has been treated in the argument as though the omission to do every item perfectly was an abandonment of the contract. That seems to me, with great respect, to be absolutely and entirely wrong. An illustration of the abandonment of a contract which was given from one of the authorities was that of a builder who, when he had half finished his work, said to the employer "I cannot finish it, because I have no money," and left the job undone at that stage. That is an abandonment of the contract, and prevents the builder, therefore, from making any claim, unless there be some other circumstances leading to a different conclusion. But to say that a builder cannot recover from a building owner merely because some item of the work has been done negligently or inefficiently or improperly is a proposition which I should not listen to unless compelled by a decision of the House of Lords. Take a contract for a lump sum to decorate a house; the contract provides that there shall be three coats of oil paint, but in one of the rooms only two coats of paint are put on. Can anybody seriously say that under these circumstances the building owner could go and occupy the house and take the benefit of all the decorations which had been done in the other rooms without paying a penny for all the work done by the builder, just because only two coats of paint had been put on in one room where there ought to have been three?

I regard the present case as one of negligence and bad workmanship, and not as a case where there has been an omission of any one of the items in the specification. The builders thought apparently, or so they have sworn, that they had done all that was intended to be done in reference to the contract; and I suppose the defects are due to carelessness on the part of some of the workmen or of the foreman: but the existence of these defects does not amount to a refusal by them to perform part of the contract; it simply shows negligence in the way in which they have done the work. Thus, in regard to the rolled steel joists they have not apparently bolted them together in some particular way, the precise nature of which I confess I do not understand.

Then what is the result? It seems to me that the result is that

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the builders are entitled to recover the contract price, less so much as it is found ought to be allowed in respect of the items which the official referee has found to be defective. There is no finding by the referee as to what the precise figures should be, and, unless they are agreed, the matter must go back to him to decide what ought to be allowed in respect of the concrete not being 4 feet and the wrong joining of the rolled steel joists, and what, if anything, ought to be allowed in respect of the concrete not having been properly mixed.

The appeal substantially fails and must be dismissed; but the case must go back, if necessary, to the official referee to find what allowance ought to be made from the sum to be paid the builders in respect of those items. The appellant must pay the costs of this appeal.

PICKFORD L.J. I agree. We have been told that if we affirm this judgment we shall be upsetting all the cases which have ever been decided in regard to contracts made for payment of a lump sum. To my mind our decision does not interfere with any one of them. Certainly I have not the slightest wish to differ from the view that if a man agrees to do a certain amount of work for a lump sum and only does part of it he cannot sue for the lump sum; but I cannot accept the proposition that if a man agrees to do a certain amount of work for a lump sum every breach which he makes of that contract by doing his work badly, or by omitting some small portion of it, is an abandonment of his contract, or is only a performance of part of his contract, so that he cannot be paid his lump sum. It seems to me that there would be a performance of the contract, although some part of it was done badly, and that seems to me to be the position here.

Here there was a contract to do a considerable amount of work to the defendant's house for the price of 264*l*. I do not understand whether the official referee's finding about the columns was a serious matter or a mere matter of detail; but the matters with which we are mainly concerned here are the concrete work in the underpinning of the side elevation, and the rolled steel joists, which are part of the work on the front elevation. According to a calculation made by the plaintiffs before they sent in their estimate the

costs of these items were estimated, so far as the concreting went, at 60*l.*, and as regards the other item at 70*l.*, so that, although they were a substantial part of the work in the specification, they were not by any means the whole of the work which had to be done under it. The official referee has found, with regard to the rolled steel joists, that they were "to be side by side, cleated at angles and bolted to caps and to each other." The plaintiffs have put in the rolled steel joists, but they have failed to bolt them together. Can it be said that this amounts to performing only a part of the contract in the sense that the contract was not finished, and therefore that the plaintiffs cannot claim any part of the lump sum at all? That would be to go beyond any case that has ever been decided, as far as I know. The other matter is in connection with the underpinning. This part of the specification is as follows: "Excavate as required and underpin the flank wall and chimney breasts with solid Portland cement concrete base. Properly level the bottom of excavations before filling in concrete," and so on. It will be noticed that in the specification no special depth of cement is mentioned: it is to be done "as required"; but in the letter which accompanied the specification the plaintiffs said that they had taken it at 4 feet. In another part of the specification I find, under the heading of "Front Elevation," "Take down the retaining wall to the front area between the existing columns. Excavate and form new Portland cement concrete foundation for same to a depth of 1 foot 6 inches below the floor of area and for a width of 2 feet." There provision is made for a specific depth, but in the other case there was not. I take it, however, that it was to be 4 feet deep. The position as to that is that the plaintiffs have done that work wrongly. They have excavated and underpinned, but they have not put in concrete of a depth of 4 feet, which, as I take it, they had contracted to do. I am not expressing any opinion as to whether what they have done is sufficient: it may or may not be; but I will assume that they had contracted to put in 4 feet of concrete, but have failed to do it. The official referee also says that they have not put in cement which is properly mixed. There is nothing in all this that seems to me to amount to doing only a part of the work contracted for and abandoning the rest. What the plaintiffs have done is to perform the work which they had contracted to do, but

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they have done some part of it insufficiently and badly; and that does not disentitle them to be paid, but it does entitle the defendant to deduct such an amount as is sufficient to put that insufficiently done work into the condition in which it ought to have been according to the contract.

That seems to me to be the position here, and therefore the decision of the Divisional Court was right, but with this exception: they arrived at the deductions to be made from the contract price in a way to which the parties did not agree, and by some rule of thumb method that cannot, I think, be supported unless both parties agree. Of course the defendant may wish to appeal to the House of Lords; but if not, I think the parties would be very foolish if they did not agree these figures. I am sure that they can be quite easily agreed. If, however, the parties do not agree them, the case must go back to the official referee in order that it may be ascertained what is the expenditure necessary, first, to put this underpinning right and make it accord with the contract both in regard to quality and quantity, and, secondly, to do the work which ought to have been done with regard to bolting together the rolled steel joists. It is not intended that there should be another roving inquiry over the whole contract.

WARRINGTON L.J. I agree, and I have nothing to add.

Appeal dismissed.

Solicitors for plaintiffs: *Kimber Bull & Duncan.*
Solicitors for defendant: *Colyer & Colyer.*

H. C. R.

[IN THE COURT OF APPEAL.]

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PAPWORTH *v.* MAYOR, &c., OF BATTERSEA (No. 2).

[1912 P. 2125.]

London—Paving and making up Street—Constructing Gully to carry off Surface Water into Sewer—Placing Grating over Gully—Exercise of Statutory Powers—Work carried out with Reasonable Care and Skill—Grating as laid being dangerous to Cyclists—Liability of Local Authority for Nuisance—Metropolis Management Act, 1855 (18 *&* 19 *Vict. c.* 120), s. 105.

A local authority in 1883, acting under s. 105 of the Metropolis Management Act, 1855, paved and made up a road, and for the purpose of carrying away the surface water they constructed a gully near the side of the road leading into a subjacent sewer, and covered the hole with a grating. The grating and framework were so laid as to cause a considerable depression in the road, but the work was done with due care and skill in accordance with the usual method at the time. In 1912 the plaintiff was riding a bicycle along the road, when in passing over the grating she was, in consequence of the depression in the road, thrown from her bicycle and injured. In an action against the local authority to recover damages for the injuries so sustained, the jury found that the grating, by reason of the excessive depression in the original construction, was dangerous to a careful cyclist, but that the local authority were not negligent in not having discovered the defect :—

Held, that, as the local authority, in the execution of their statutory powers, had exercised due care and skill in the original construction of the grating, and as they were not negligent in not having discovered the danger, they were not liable though the work turned out subsequently to be dangerous.

Application for judgment or a new trial in an action tried before Scrutton J. and a jury.

The plaintiff claimed damages for personal injuries caused to her on June 26, 1912, as she alleged, by the negligence of the defendants as the owners of a certain grid or grating placed in a public highway known as Lombard Road, in the borough of Battersea, above a sewer, also their property, running under that road. The negligence alleged was in not properly laying, placing, or keeping the grid or grating and sewer in proper order or repair, but in permitting the same to become in a broken, sunken, and dangerous condition, in consequence whereof the plaintiff, while lawfully riding her bicycle

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along the highway over the grid or grating, had the handle bars of the bicycle jerked from her hands, causing her to lose control of the bicycle, and she was thrown on to the road and under the wheels of a carriage and was injured. The particulars of negligence, so far as material, alleged that the grid or grating was half an inch below the level of the frame in which it should have fitted and three or four inches below the level of the surrounding granite setts.

It appeared that the plaintiff, in order to avoid a victoria which was approaching her in a narrow part of the road, went to the side where the grating was and in riding over the grating was thrown off as above mentioned and injured.

By s. 68 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), all sewers therein described situate in any parish mentioned in Sched. A to the Act, with the gullies, grates, works, and things thereunto appertaining, were vested in the vestry of such parish; and all sewers therein described situate in any district mentioned in Sched. B, with all such works as aforesaid, were vested in the board of works for the district; and by s. 69 the vestry or district board were bound to repair and maintain them. By s. 96 every vestry and district board were to execute the office of the surveyor of highways.

The Wandsworth district was one of the districts mentioned in Sched. B to the Act. One of the parishes in this district was the parish of St. Mary, Battersea (excluding Penge). The area of that parish included Lombard Road. In the year 1883 the Wandsworth District Board of Works paved and made up Lombard Road under the provisions of s. 105 of the Act, and in doing so constructed a gully from the surface of the road into a subjacent sewer which was vested in them so as to carry off the surface water from the road, and covered the gully with the grid or grating in question. The evidence showed that the work was done according to the best skilled opinion of the day.

By s. 4 of the Metropolis Management (Battersea and Westminster) Act, 1887 (50 & 51 Vict. c. 17), the parish of St. Mary, Battersea (excluding Penge), ceased to form part of the Wandsworth district, and "the principal Act"—the Act of 1855—"shall be read and have effect as if the said parish excluding Penge had been named in Part II. of Schedule A of the said Act, and the vestry of the said

parish shall become and be a body corporate by the name of the vestry of the parish of St. Mary Battersea."

By s. 4 of the London Government Act, 1899 (62 & 63 Vict. c. 14), the powers, duties, property, and liabilities of the vestry of the parish of St. Mary, Battersea, were transferred to the defendants.

The action was first tried before Horridge J. and a jury, when the jury found that the accident was caused by negligence in the construction of the gully in allowing it to be below the roadway, and that the defendants were negligent in not remedying the defect in the gully. The learned judge held that the effect of s. 4 of the Act of 1887 was not to transfer to the vestry of Battersea any existing liability of the Wandsworth District Board of Works in respect of the defective gully, and consequently no such liability was transferred to the defendants by the Act of 1899; but he held that the defendants, although not liable as highway authority, were liable as sewer authority for not remedying the defect. The case is reported [1914] 2 K. B. 89.

The Court of Appeal ordered a new trial: [1915] 1 K. B. 392. At the second trial, which took place before Scrutton J. and a jury, the learned judge left certain questions to the jury which, with the answers thereto, were as follows:—

1. At the time of the accident was a piece of the frame of the grating missing?—Yes.

2. Was the grating at the time of the accident dangerous to a careful cyclist; if so, in what respect?—No, not the grating itself.

Was the danger due to the original construction; if so, what was the defect?—Yes, excessive depression.

Or to some subsequent alteration of position; if so, what caused it?—No.

3. Was the plaintiff's injury caused (*a*) by the broken frame, or (*b*) by the dangerous condition of the grating?—Neither specifically.

4. Could the plaintiff have avoided her injury by the exercise of reasonable care and skill?—No, considering the presence of the victoria and the state of and depression in the road.

5. Was the grating part of the road or part of the sewer?—Part of the road.

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6. (*a*) Who placed the grating in the road ?—The Board of Works for the Wandsworth District.

(*b*) Who paid for it ?—The frontagers.

(*c*) Who controlled and maintained it ; the road authority or the sewer authority ?—The road authority.

7. Did (*a*) the road authority or (*b*) the sewer authority by their servants at the time of the accident know, or could they by the exercise of reasonable care have known, of the defect, if any, in the grating or frame and remedied it ?—No.

The jury assessed the damages at 755*l*.

A discussion took place between the learned judge and the jury as to the meaning of the answers to questions 2 and 3. With regard to the answer to question 2, the jury said that the grating itself was not dangerous, but that the grating and frame in the original depression were dangerous. With regard to the answer to question 3, the jury said that the accident was caused by the broken frame and grating in the excessive depression.

Scrutton J., without expressing any opinion of his own, followed the decision of Horridge J. that there was no transfer to the defendants of any liability of the Wandsworth District Board of Works in respect of the construction of the grating ; and he held that as the defendants in their capacity as road authority had not committed any act of misfeasance they were not liable. He accordingly gave judgment for the defendants. (1) The plaintiff appealed.

F. A. Greer, K.C., and *Sidney Lamb* (*Cecil Fitch* with them), for the plaintiff. Assuming that the grating was placed over the gully leading into the sewer by the Wandsworth District Board in their capacity as the road authority, the placing of the frame and grating in the dangerous condition in which they were owing to the excessive depression in the road was an act of misfeasance. Having made a hole in the road for the purpose of draining the surface water into the subjacent sewer, it became the duty of the board to cover the hole in such a way as not to cause danger to the traffic passing along the road. For any accident caused by the defective execution of the work the board would have been liable : *Shoreditch*

(1) 84 L. J. (K.B.) 1881.

Corporation v. *Bull* (1); *McClelland* v. *Manchester Corporation*. (2) In the latter case Lush J. pointed out that the doctrine of non-liability of a highway authority for non-feasance "has no application to a case where the road authority have done something, made up or altered or diverted a highway, and have omitted some precaution, which, if taken, would have made the work done safe instead of dangerous." That applies to the present case. The defendants' predecessors undertook the performance of a statutory duty, and performed it improperly. If it is necessary to prove negligence, it follows from the jury's findings that the grating was negligently laid. The liabilities of the Wandsworth District Board were by s. 4 of the Metropolis Management (Battersea and Westminster) Act, 1887, transferred to the vestry of St. Mary, Battersea. The Act placed the vestry in the same position with regard to rights and liabilities as if it had been originally named in Sched. A to the Metropolis Management Act, 1855, and therefore anything done in the parish of St. Mary, Battersea, by the Wandsworth District Board must be taken to have been done by them as agents for or upon the instructions of the vestry. The Legislature cannot have intended to preserve to the Wandsworth District Board a liability in respect of an area outside their district, which they have no right to enter for the purpose of remedying the defect. Then by s. 4 of the London Government Act, 1899, the property and liabilities of the vestry were transferred to the defendants. The judgment of Horridge J. on the first trial of this case (3) upon this point, which Scrutton J. followed, is wrong. [*Attorney-General* v. *Theobald* (4) was also referred to.]

Further, the act of making a hole in the road for the purpose of connecting with the sewer was an act done by the Wandsworth District Board as the sewer authority, and therefore no question of misfeasance or non-feasance arises: *White* v. *Hindley Local Board* (5); *Blackmore* v. *Mile End Vestry*. (6) The surveyor of highways had no power to make a connection between the road and the sewer. Even if there was no transfer of liabilities by the Act of 1887, the grating was by s. 68 of the Act of 1855 vested in the

(1) (1904) 90 L. T. 210.
(2) [1912] 1 K. B. 118, 127.
(3) [1914] 2 K. B. 89.
(4) (1890) 24 Q. B. D. 557.
(5) (1875) L. R. 10 Q. B. 219.
(6) (1882) 9 Q. B. D. 451.

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defendants as the sewer authority, and it was their duty to keep it in proper order. Their failure to discover its dangerous condition was due to negligence on their part, and the verdict of the jury upon this point cannot stand.

Lewis Thomas, K.C., and *W. R. Warren*, for the defendants. At the trial the question of nuisance was not raised, and therefore it cannot be raised now: *Nevill* v. *Fine Art and General Insurance Co.* (1); *Seaton* v. *Burnand.* (2) Apart from that, the jury have not found that there was any negligence on the part of the Wandsworth District Board in the mode in which the grating was originally laid. As the grating was laid in accordance with the best expert opinion of the time, there was no negligence: *Newberry* v. *Bristol Tramways and Carriage Co.* (3); see also *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General.* (4) The district board, in making up and paving the road in 1883, were exercising their statutory powers under s. 105 of the Metropolis Management Act, 1855, and having exercised those powers with due care, and not having been negligent in not discovering the defect, the district board are not liable, though the mode in which the grating was laid turned out afterwards to be a source of danger to those using the road: *Lambert* v. *Lowestoft Corporation* (5); *McClelland* v. *Manchester Corporation* (6); *Fleming* v. *Manchester Corporation.* (7) As Scrutton J. said in the present case (8), the obligation of the road authority "is to use reasonable care in the construction of the road, and not absolutely to warrant the safety of the road." Therefore the Wandsworth District Board would not have been liable, and the jury have negatived any possible liability in the defendants by their finding that the defendants were not negligent in not having discovered the defect. [*Saunders* v. *Holborn District Board of Works* (9), *Maguire* v. *Liverpool Corporation* (10), and *Short* v. *Hammersmith Corporation* (11) were also referred to.]

Next, even if the Wandsworth District Board would have been liable, their liability has not been transferred to the defendants.

(1) [1897] A. C. 68, 76.
(2) [1900] A. C. 135, 143, 145.
(3) (1912) 107 L. T. 801.
(4) [1915] A. C. 654.
(5) [1901] 1 K. B. 590.
(6) [1912] 1 K. B. 129.
(7) (1881) 44 L. T. 517.
(8) 84 L. J. (K.B.) 1881, 1885.
(9) [1895] 1 Q. B. 64.
(10) [1905] 1 K. B. 767, 790.
(11) (1910) 104 L. T. 70.

Sect. 9 of the Metropolis Management (Battersea and Westminster) Act, 1887, transferred to the vestry of St. Mary, Battersea, the property, but not the liabilities, of the Wandsworth District Board; whereas by s. 13, in the case of Westminster the liabilities were transferred to the new body.

Sidney Lamb in reply.

PICKFORD L.J. This case is made somewhat difficult owing to some confusion in the findings of the jury. The plaintiff alleged that the cause of the accident was the negligence of the defendants, or of a body whose liabilities were transferred to them, in having an improper and dangerous grating in the highway. She alleged that a piece of the grating was broken, which made it likely that the wheel of a bicycle would catch in it; and further that the grating, which was a curved one, was at an excessive distance below the surface of the road. It was alleged at the trial that the grating had sunk in consequence of improper construction, but the jury negatived that.

I understand the answer of the jury to the second question to mean that there was no danger to a careful cyclist by reason of the piece of grating being missing. Some of the findings are a little difficult to understand, but I think that the effect of them is this, that the accident was caused by the undue depression of the grating below the surface of the road causing a steep decline, that that depression was a part of the original construction, and that the defendants were not negligent in not having discovered that that extreme depression was dangerous. The road was made up and the grating was laid in 1883 by the Wandsworth District Board of Works. The jury have found that the grating was dangerous, but they have not in terms found that there was any negligence on the part of the Wandsworth District Board in constructing it in that way. It is said that the jury have impliedly found negligence. In my opinion to imply a finding of negligence would be very dangerous. If negligence is relied upon as the foundation of an action it should be expressly found. The contention is that when the jury found that there was danger by reason of the excessive depression of the grating as originally constructed they must have found that there was negligence in the construction. The evidence,

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however, was substantially uncontradicted that this method of construction both of the grating and frame and of the adjoining parts of the road was the universal method of construction at the time according to the state of skilled knowledge then existing. There are now, we are told, hundreds of these gratings similarly placed within this borough, and there are probably thousands in the London district. I do not think that it can be implied that the jury intended to find that the grating was negligently laid. It is quite possible to have a thing which experience shows to be a danger, and yet there may not have been any negligence in laying it.

There being no finding of negligence, the case must be looked at from this point of view. The Wandsworth District Board of Works, exercising proper and reasonable care and skill, constructed about thirty years before this accident happened a grating in a manner which was not negligent, but which the jury found in the circumstances of this case to be dangerous. In my opinion the defendants are not responsible. The Wandsworth District Board laid the grating under the provisions of s. 105 of the Metropolis Management Act, 1855, when they were paving and making up Lombard Road. They were exercising statutory powers. I cannot perhaps say that they were fulfilling a statutory obligation, because the section only empowers them to pave and make up the street, and does not oblige them to do so. They were at any rate exercising statutory powers, and I think their duty was that stated by Lush J. in *McClelland* v. *Manchester Corporation* (1): "It is no doubt true that when a road is dedicated as a highway the public, or the road authority, if they accept it, take it as it is with all its defects. But if a road authority undertake a duty with regard to it, and make it up, and open it to the public as a made-up street, they must, in my opinion, exercise due care and have due regard to the safety of those who will use it. It is, I think, clear law that when a local authority undertakes and performs a duty, whether they are bound by statute to do so or whether they have an option to perform it or leave it unperformed, however it arises, they are bound to exercise proper and reasonable care in its performance, and that there is no difference in this respect between a public body and a private individual who does an act which if carelessly done may cause

(1) [1912] 1 K. B. 118, 129, 131.

injury to others." Again: "They had general powers, permissive, not imperative, to make up any street within their district in the way they thought fit, and they were bound, as it seems to me, to act reasonably in the exercise of those powers." That seems to me to be an accurate statement of the duty of the local authority when carrying out its statutory powers. I do not think that a higher duty is imposed. I do not think that there is an absolute duty imposed of making the road safe. If the local authority do something which turns out to be dangerous, but in doing it exercise reasonable care and skill, in my opinion they are not responsible. In the course of making up this road the Wandsworth District Board had, in order to prevent the surface water from remaining on it, to make an escape for the water into the subjacent sewer. For that purpose they made a hole in the roadway and a gully for the water to pass through; and they had then to make the road fit for persons to pass along it by placing a covering over the hole. Having exercised reasonable care and skill in doing that according to the best opinion prevailing at the time, in my opinion they are not responsible because the grating was found some years afterwards to be dangerous. If the state of things had been such that, as time went on, it became clear that the grating so placed was dangerous, and if the local authority who laid it or their successors allowed it to remain so, they might be responsible, because it might be said that they were negligent in not having altered it. Any such case as that has been negatived by the finding of the jury. That is sufficient to dispose of the case.

Questions were raised as to whether the grating was part of the road or part of the sewer, so as to be under the control of the local authority as the highway authority or as the sewer authority, and whether if the former there was misfeasance or non-feasance, but in the view I take of the case it is not material to consider them.

Another question of some difficulty has been discussed as to whether the liabilities of the Wandsworth District Board were transferred by the Act of 1887 to the Battersea Vestry and by the Act of 1899 from them to the defendants. As I take the view that the Wandsworth District Board would not have been liable, it is not necessary to inquire whether any liability was transferred. I express no opinion upon it. The appeal fails.

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BANKES L.J. I agree. The plaintiff at the trial alleged, not only that a portion of the grating was broken, but also that owing to defective construction the surface of the grating had sunk; that the defendants were responsible for that condition of the grating as the sewer authority of the district; and that no question of misfeasance or non-feasance arose. She also alleged that, even if the grating had been originally improperly constructed by the Wandsworth District Board as the highway authority, that was an act of misfeasance, and that their liability for that improper construction, as well as any liability they might be under as the sewer authority, had been transferred to the Battersea Vestry under the Act of 1887 and to the defendants under the Act of 1899. A number of questions were put to the jury, and, while I do not think that some of the answers are quite clear, I agree with what Scrutton J. said with regard to them (1): "They find that the frame of the grid was broken and part of it was missing; but I think the effect of their seventh finding (2) is that that broken part was so full of detritus that it was not negligent not to have discovered that it was broken; and they find that what caused the accident was that in the original construction of the channelling, gully, and grating the surface level of the grating was placed so much lower than the surrounding road that it was in fact a danger; but as I read it they also find that, though it was a danger, it was not negligence not to have seen that it was a danger, which I think must mean that they thought that it was the ordinary method of construction at the time it was made." It seems to me that that is what the jury intended to convey. They found that this grating as originally constructed was a danger having regard to the fact that this accident happened, but that owing to the state of engineering knowledge and practice at the time when the grating was laid there was no negligence on the part of those who laid it, and there was no negligence on the part of those in whose care it subsequently was in not having discovered the defect in it.

In these circumstances, what is the position of the plaintiff? She does not ask that any further questions should be submitted to the jury, nor does she complain that any question was not

(1) 84 L. J. (K.B.) 1884.

(2) In the *Law Journal* report the seventh finding is numbered as twelfth.

submitted to the jury which ought to have been. She is content to rest her case on the findings as they stand. It seems to me that this case falls within the principle of *Geddis* v. *Proprietors of Bann Reservoir* (1), and that is in accordance with the view taken by Lush J. in *McClelland* v. *Manchester Corporation* (2) which has been referred to by Pickford L.J. In *Geddis* v. *Proprietors of Bann Reservoir* (3) Lord Blackburn said: "It is now thoroughly well established that no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the Legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers." That being the law applicable to this case, has the plaintiff established that there was negligence on the part of the Wandsworth District Board in the original construction of this grating? There is no such finding; on the contrary, if the view of Scrutton J. as to what the findings mean is accepted, the jury negatived negligence. In my opinion, therefore, the appeal fails.

With regard to the other point, which has already been before two judges, I think that the defendants are also right. Sect. 4 of the Metropolis Management (Battersea and Westminster) Act, 1887, provides that "the parish of St. Mary, Battersea, excluding Penge shall cease to be united with the parishes mentioned in Schedule B of the principal Act as forming the Wandsworth district, and the principal Act shall be read and have effect as if the said parish excluding Penge had been named in Part II. of Schedule A of the said Act." If the vestry of St. Mary, Battersea, had been originally named in Sched. A, the effect would have been that the vestry would have had the right to do the work to this road, which was in fact done by the Wandsworth District Board; but that does not seem to me to impose any obligation upon them, or to transfer a liability to them, if in fact they did not execute the work. Assuming, therefore, that there was a liability in the Wandsworth District Board, there

(1) (1878) 3 App. Cas. 430. (2) [1912] 1 K. B. 118.
(3) 3 App. Cas. 455.

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are no words, so far as I can see, which pass on the liability to the Battersea Vestry, who have not done the work.

In my opinion the appeal fails on both grounds.

NEVILLE J. I think that the question in this case largely depends upon how we are to understand the findings of the jury. I agree that, even though the grating was so constructed in 1883 that many years afterwards it proved to be a danger to cyclists, that would not be such a misfeasance as would make the road authority liable unless they had failed to take reasonable care in the original construction. After all the consideration I can give to the findings of the jury, I agree with the Lords Justices that there is no finding of any such want of reasonable care. That determines the case.

I do not wish it to be understood that, if the Wandsworth District Board had been guilty of negligence in the construction of the gully and grating, the defendants would not, in my opinion, have been liable, because I am not satisfied that the whole of the liabilities of the Wandsworth District Board were not, by force of the provisions of the Act of 1887, transferred to the vestry and consequently by the Act of 1899 to the defendants.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *W. W. Young, Son & Ward.*
Solicitor for defendants: *P. Caudwell.*

W. F. B.

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Nov. 16, 17, 18;
Dec. 17.

Alien—Naturalization—Privy Councillor—Qualification—Quo Warranto—Jurisdiction—Construction of Statutes—Repeal by Implication—Act of Settlement, 1700 (12 & 13 *Will.* 3, *c.* 2), *s.* 3—*Naturalization Act*, 1870 (33 & 34 *Vict. c.* 14), *s.* 7—*British Nationality and Status of Aliens Act*, 1914 (4 & 5 *Geo.* 5, *c.* 17), *s.* 3.

An information in the nature of a quo warranto will lie at the instance of a private relator against a member of the Privy Council whose appointment is alleged to be invalid.

The respondents, who were born abroad of foreign parents, became naturalized British subjects in 1892 and 1878, and were made members of the Privy Council in 1909 and 1902, respectively:—

Held, that the effect of the Naturalization Act, 1870, was to render the respondents, after their naturalization, capable of being members of the Privy Council, and that sub-s. 2 of s. 3 of the British Nationality and Status of Aliens Act, 1914, has not revived in the case of a naturalized alien the disqualification for membership of the Privy Council contained in s. 3 of the Act of Settlement.

RULES NISI calling upon Sir Edgar Speyer and Sir Ernest Joseph Cassel to show cause why informations in the nature of a quo warranto should not be exhibited against them to show by what authority they were, or claimed to be, members of His Majesty's Privy Council for Great Britain.

The rules were obtained by Sir George Makgill on the grounds that both the respondents were born out of the United Kingdom and the dominions thereunto belonging and were not born of English parents, and that by s. 3 of the Act of Settlement (1) and s. 3,

(1) The Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), s. 3, provides that "No person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging (although he be naturalized or made a denizen, except such as are born of English parents) shall be capable to be of the Privy Council or a member of either House of Parliament or to enjoy any office or place of trust either civil or military or to have any grant of lands, tenements or hereditaments from the Crown, to himself or to any other or others in trust for him."

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sub-s. 2, of the British Nationality and Status of Aliens Act, 1914 (1), they were not capable to be of the Privy Council.

The respondent Speyer was born in 1862 outside the King's dominions of alien parents. He became a naturalized British subject in 1892, and was appointed a member of the Privy Council in 1909.

The respondent Cassel was born in Germany in 1852 of alien parents. He became a naturalized British subject in 1878, and was appointed a member of the Privy Council in 1902.

Cause was shown against the rules by *Sir F. E. Smith, A.-G.*, and *Sir G. Cave, S.-G.* (*Branson* with them), for the Clerk to the Privy Council and the Secretary of State for Home Affairs, and by *Sir R. B. Finlay, K.C.*, and *Leslie Scott, K.C.* (*McCardie* with them), for the respondent Cassel.

Sir F. E. Smith, A.-G. This attempt to use an information in the nature of a quo warranto in order to question the legality of the appointments of the respondents as Privy Councillors is founded on a misconception of the scope of that procedure. First, the appointments are not a usurpation of the Royal prerogative, for the facts alleged show that their illegality, if any, is the act of the Crown. In very early days the writ of quo warranto assumed the form of a civil action at the suit of the King to ascertain the grounds on which a subject was entitled to exercise rights actually or theoretically performed by the Sovereign. The essence of the procedure was that the Sovereign was calling a subject to account for an invasion or usurpation of the Royal prerogative, or of the rights, franchises, or liberties of the Crown : " Eyre of Kent " (published by the Selden Society), vol. 1, pp. 28—46 ; Tancred on Quo Warranto, introd., pp. iii., ix. ; Blackstone's Commentaries (1811 ed.), vol. 3,

(1) The British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. 5, c. 17), s. 3 : " (1.) A person to whom a certificate of naturalization is granted by a Secretary of State shall, subject to the provisions of this Act, be entitled to all political and other rights powers and privileges, and be subject to all obligations, duties and liabilities, to which a natural-born British subject is entitled or subject, and, as from the date of his naturalization, have to all intents and purposes the status of a natural-born British subject.

" (2.) Section 3 of the Act of Settlement (which disqualifies naturalized aliens from holding certain offices) shall have effect as if the words 'naturalized or' were omitted therefrom."

c. 17, s. 5. In this case the complaint is not that the respondents are claiming to exercise rights which are nominally vested in the Crown, but that they have been wrongfully appointed to a position which from its very nature never has been or could be held by the King, namely, the position of adviser to the Crown. It is no invasion of any one's rights if the King chooses an unqualified person to act as a member of the Privy Council. The form of these proceedings involves the position that the King himself comes to this Court and complains that his prerogative has been infringed by something which he himself has done. No authority can be found which presents the slightest feature of analogy to the present case.

In *Darley* v. *The Queen* (1) the authorities were reviewed by Tindal C.J., who said (2): "The result appears to be, that this proceeding by information in the nature of quo warranto will lie for usurping any office, whether created by charter alone, or by the Crown, with the consent of Parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others; for, with respect to such an employment, the Court certainly will not interfere, and the information will not properly lie." That has always been since recognized to have been a correct statement of the law: *Reg.* v. *Guardians of St. Martin's.* (3)

In *Reg.* v. *Lords Commissioners of the Treasury* (4) Cockburn C.J. said: "When a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question. Over the Sovereign we can have no power. In like manner where the parties are acting as servants of the Crown, and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction." Those observations were made with reference to the jurisdiction of this Court in a case of mandamus; they are equally applicable to quo warranto. *Reg.* v. *Taylor* (5) is to the same effect. These proceedings are a contradiction of the maxim that the King can do no wrong.

(1) (1846) 12 Cl. & F. 520.
(2) Ibid. 541.
(3) (1851) 17 Q. B. 149.
(4) (1872) L. R. 7 Q. B. 387, 394.
(5) (1840) 11 Ad. & E. 949.

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[AVORY J. referred to Chitty's Prerogatives of the Crown, p. 336.]

Secondly, a judgment in favour of the relator would be useless. The result would be the resumption of the office into the King's hands, or, if not, an ouster of the respondents. The only way in which membership of the Privy Council can be terminated is by striking the name of the member off the list of Privy Councillors, but the Clerk to the Privy Council, whose duty it would be to perform that act, is amenable only to the King, and the King could ignore the judgment of this Court. Except in very rare cases, Parliament has not thought it either useful or necessary to provide remedies for the failure of the Crown to perform its obligations or to observe restrictions upon the exercise of its prerogative. The extent of the King's prerogative was formerly very great in fact, and theoretically is so at the present time, but there is no remedy for a misuse of it, and the absence of a remedy is no ground for quo warranto. The issue of an information in the nature of a quo warranto is discretionary, and the fact that the order of the Court cannot be enforced, if it is disobeyed, is a good reason why the Court in the exercise of its discretion should refuse to make the order.

Thirdly, a Privy Councillor does not hold an "office" of a public nature, and, fourthly, in any case the appointment can be revoked at any time by the Crown: Todd's Parliamentary Government in England, vol. 2, p. 53; and therefore quo warranto is not applicable, for, as Tindal C.J. said in *Darley* v. *The Queen* (1), the information will not lie in the case of "the function or employment of a deputy or servant held at the will and pleasure of others," nor, as was pointed out in *Reg.* v. *Lords Commissioners of the Treasury* (2), will it lie where the party is amenable to the Crown, the reason being that if the appointment can be revoked at the will of the Crown quo warranto is not wanted. In *Darley* v. *The Queen* (3) Lord Brougham stated that one material consideration which weighed with him was that if quo warranto did not lie in that case, there was no other remedy. That observation was unnecessary for the decision and is opposed to the authorities: see *In re Aston Union* (4), where Patteson J. said: "As for there being no other

(1) 12 Cl. & F. 542.
(2) L. R. 7 Q. B. 387, 394.
(3) 12 Cl. & F. 544.
(4) (1837) 6 Ad. & E. 784.

remedy, that is a good argument on an application for a mandamus, but not on one for a quo warranto." In Short and Mellor's Crown Office Practice, 2nd ed., at p. 174, there is set out a list of offices held at pleasure, and there is no case in which any of those offices have been called in question by quo warranto. [He referred to *Reg.* v. *Dyer* (1), *Rex* v. *Mayor of Colchester* (2), *Reg.* v. *Fox* (3), and *Ex parte Parry.* (4)]

[LORD READING C.J. referred to *Bradley* v. *Sylvester.* (5)]

Lastly, in a case of the invasion of the King's prerogative the Attorney-General alone has the right to institute the proceedings. The statute 4 & 5 Will. & Mar. c. 18 restrained the filing of informations except by the leave of the Court. By 9 Anne, c. 25, authority was given to file informations in the nature of quo warranto in the case of municipal corporations on the relation of private persons. It is clear from the authorities that in certain cases the proceedings cannot be instituted by a private relator, and a distinction seems to have been drawn between cases which only affect individuals or groups of individuals and cases which affect the nation as a whole. In the latter class the Attorney-General alone has the right to move: *Rex* v. *Marsden* (6); *Rex* v. *Trelawney* (7); *Rex* v. *Carmarthen Corporation* (8); *Sir William Lowther's Case* (9); *Ibbotson's Case* (10); *Rex* v. *Ogden* (11); *Ware* v. *Regent's Canal Co.* (12)

Sir R. B. Finlay, K.C., and *Leslie Scott, K.C.* The contention put forward in support of the application for the rules nisi was that by reason of the language of sub-s. 2 of s. 3 of the British Nationality and Status of Aliens Act, 1914, a naturalized person not born of British parents is disqualified from membership of the Privy Council. That contention involves construing sub-s. 2 so as to contradict sub-s. 1, which in clear and unambiguous language provides that a naturalized person "shall be entitled to all political and other rights powers and privileges" to which a natural-born

(1) (1849) 13 Q. B. 851.
(2) (1788) 2 T. R. 259.
(3) (1858) 8 E. & B. 939.
(4) (1887) 3 Times L. R. 649.
(5) (1871) 25 L. T. 459.
(6) (1765) 3 Burr. 1812.
(7) (1765) 3 Burr. 1616.
(8) (1759) 2 Burr. 869.
(9) (1725) 2 Ld. Raym. 1409.
(10) (1736) Lee temp. Hardw. 261.
(11) (1829) 10 B. & C. 230.
(12) (1858) 28 L. J. (Ch.) 153.

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British subject is entitled. The language of sub-s. 1, when read in the light of the previous legislation on the subject, clearly indicates that the intention was to place naturalized persons in the same position as natural-born persons without any restrictions whatever. Previously to the passing of the Act of Settlement aliens were at common law disqualified from holding many offices.

[LUSH J. referred to *Rex* v. *Superintendent of Albany Street Police Station.* (1)]

Naturalization by special Act of Parliament placed the naturalized subject in the same position as the natural-born subject. Then, by s. 3 of the Act of Settlement a number of disqualifications was introduced in the case of persons, although naturalized, who were born abroad of foreign parents. These persons were rendered incapable of being of the Privy Council or members of Parliament, or of holding any office either civil or military, or of having any grant of lands from the Crown. By the Act of 1844 (7 & 8 Vict. c. 66) all the disqualifications contained in s. 3 of the Act of Settlement were removed, with the exception of membership of the Privy Council and Parliament, and such parts of the Act of Settlement as were inconsistent with the Act of 1844 were repealed. That Act was repealed by the Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 7 of which provided that a naturalized alien " shall in the United Kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom." The effect of that enactment was to remove the disqualifications which still remained after the Act of 1844, and to enable a naturalized alien to become a member of Parliament or of the Privy Council. The respondent Cassel was appointed to the Privy Council during the currency of the Act of 1870, and his appointment was, and still is, legal, unless, as is contended by the relator, the position has been changed by the Act of 1914. The contention is apparently that the effect of sub-s. 2 of s. 3 is to undo all the work of the preceding Victorian legislation and to re-enact all the disqualifications of the Act of Settlement. That would be a strange result to follow from an Act which is stated to be " an Act to consolidate and amend the Enactments relating to British Nationality and the Status of

(1) [1915] 3 K. B. 716.

Aliens" and which by s. 3, sub-s. 1, not only re-enacts the language of s. 7 of the Act of 1870, but further enacts that the naturalized alien shall "have to all intents and purposes the status of a natural-born British subject." Sub-s. 2 cannot be construed as contradicting sub-s. 1; it was probably introduced for the purpose of making it clear that the disqualifications imposed on naturalized aliens by s. 3 of the Act of Settlement were intended to be removed. [On the question of jurisdiction they referred to *Reg.* v. *Hampton.* (1)]

Sir G. Cave, S.-G. The effect of s. 3 of the Act of Settlement is that a person born abroad, although naturalized, if not of British parents, is subject to the disqualifications specified in the section. The Act of 1844 removed all these disqualifications with the exception of two, membership of Parliament and of the Privy Council, which are continued by express words. Sect. 7 of the Act of 1870 conferred on naturalized aliens "all political and other rights, powers, and privileges," without any relevant exceptions. This is tantamount to an express repeal of the disqualifications retained in the Act of 1844. With regard to the Act of 1914, if sub-s. 2 of s. 3 is read literally, it re-enacts all the disqualifications imposed by the Act of Settlement, including those removed by the Act of 1844. That cannot have been the intention. The object of sub-s. 2 was to remove the apparent inconsistency between sub-s. 1 and s. 3 of the Act of Settlement.

The respondent Cassel was appointed to the Privy Council in 1902. The Court, in exercising its discretion in a case of this kind, will not entertain the application after a lapse of more than six years from the date of the appointment: *Rex* v. *Dicken* (2); Crown Office Rules, r. 124.

Roskill, K.C. (*T. H. Parr* with him), for the respondent Speyer, stated that this respondent had offered to resign his membership of the Privy Council, but that His Majesty had not been pleased to accept his resignation. In these circumstances this respondent felt that it would be inconsistent for him to assert a claim to an honour which he had offered to resign. But he appeared by counsel out of respect to the Court, and to afford any assistance to the Court that was in his power. [Counsel contended that under

(1) (1865) 6 B. & S. 923. (2) (1791) 4 T. R. 282.

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the Act of 1870 this respondent was qualified to be a member of the Privy Council. He referred to the *Cheltenham Election Case.* (1)]

Powell, K.C., and *Claud Mullins*, for the relator, in support of the rules. The King has deputed to the judges of this Court the power of administering the laws of this country, and it is a startling proposition that this Court has no power to declare what are the powers of the Crown under an Act of Parliament. From the earliest times the King's writ ran to prevent the infringement of the law. In Fitzherbert's Natura Brevium, 9th ed., at pp. 167, 172, 240, will be found instances of special writs on statutes. The authorities show that the writ of quo warranto has been employed in cases where an act of the Crown has been called in question. In *Rex* v. *Amery* (2) proceedings by quo warranto were employed for the purpose of calling in question the validity of a charter granted by Charles II. Instances in modern times of the power of the Courts to adjudicate upon questions relating to the exercise of the powers of the Crown are to be found in *Walker* v. *Baird* (3) and *Eastern Trust Co.* v. *McKenzie, Mann & Co.* (4) It is conceded that if quo warranto is not the proper remedy in this case there is none other. That in itself is an almost conclusive answer to the argument of the Attorney-General. It is no doubt true that in early times quo warranto was confined to cases of encroachment upon the King's prerogative and the writ was only issued at the suit of the Crown. But as time went on the procedure developed, and it was found that the writ itself was not a convenient method of dealing with all the cases which might arise under quo warranto, and informations in the nature of quo warranto came into use. The first instance of an information of this sort is to be found in *Rex* v. *Hertford Corporation* (5), where the relator was a private person. That case also shows that quo warranto was not restricted to franchises and offices granted by the King: see also *Rex* v. *Beedle* (6); *Rex* v. *Mein.* (7) *Rex* v. *Boyles* (8) shows that a quo warranto information lies in respect of any office which concerns the public, although if the office be a very small one, such as the office of petit constable, the Court

(1) (1880) 3 O'M. & H. 86.
(2) (1788) 2 T. R. 515.
(3) [1892] A. C. 491.
(4) [1915] A. C. 750.
(5) (1698) 1 Ld. Raym. 426.
(6) (1834) 3 Ad. & E. 467.
(7) (1790) 3 T. R. 596.
(8) (1729) 2 Ld. Raym. 1559.

may refuse to grant the information : *Anon.* (1) Nor is it an answer to these proceedings to say that the office of Privy Councillor is one which cannot be held by the King in person. In Chitty's Prerogatives of the Crown, p. 336, is the following passage : " Nor is it material that the franchise is of such a nature that it cannot be seized into the King's hands or held by him, though judgment be given for His Majesty, because the defendant may still be ousted."

In *Darley* v. *The Queen* (2) Lord Brougham suggested in the course of the argument that an information in the nature of a quo warranto would lie in the case of any office relating to the exercise of any rights of the Crown. *Reg.* v. *Lords Commissioners of the Treasury* (3) was a case of mandamus and is therefore distinguishable. A judgment against the respondents in this case will not involve any command, direct or indirect, upon the Crown. [*Reg.* v. *Storrar* (4), *Rex* v. *Patteson* (5), *Reg.* v. *Ireland* (6), and *Reg.* v. *Rawlins* (7) were also referred to.]

A Privy Councillor holds an " office."

[LORD READING C.J. We do not require to hear you on that point.]

Then, does the fact that it is an office held at the pleasure of the Crown render these proceedings inapplicable ? In *Darley* v. *The Queen* (8) Tindal C.J.'s reference to the employment of a deputy or servant at the will and pleasure of others means that where the office is held at the pleasure of another subject the information will not lie : *Reg.* v. *Fox* (9) ; nor will it lie if the case is one of a mere irregularity which can be cured by reappointment : *Bradley* v. *Sylvester* (10) ; Halsbury's Laws of England, vol. x., p. 130. But if the office is one of high importance, and the appointment is one of absolute illegality which cannot be cured by reappointment, then, although the office is held at the pleasure of the Crown, proceedings by quo warranto will lie.

With regard to the question whether the proceedings can be instituted by a private person as relator, any subject of the King who is affected by the Act complained of can apply for quo warranto

(1) (1729) 1 Barn. K. B. 279.
(2) 12 Cl. & F. 529.
(3) L. R. 7 Q. B. 387.
(4) (1859) 2 E. & E. 133.
(5) (1832) 4 B. & Ad. 9.
(6) (1868) L. R. 3 Q. B. 130.
(7) (1884) 14 Q. B. D. 325.
(8) 12 Cl. & F. 542.
(9) 8 E. & B. 939.
(10) 25 L. T. 459.

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if the case involves a public usurpation on the Crown or affects the general rights of the Crown. It is only where there is a private usurpation of a franchise that it is necessary for the Attorney-General to institute the proceedings: *Ibbotson's Case*, per Lord Hardwicke C.J. (1); *Rex* v. *Ogden* (2); *Ware* v. *Regent's Canal Co.* (3)

[AVORY J. referred to *Worthington* v. *Jeffries*. (4)]

It is not necessary that the relator should have a personal interest in the matter: *Rex* v. *Kemp* (5); *Rex* v. *Brown*. (6) *Ex parte Parry* (7) was not followed in *Reg.* v. *Burrows* (8), where it was referred to by A. L. Smith J., who was one of the Court that decided it, as an "unfortunate decision."

With regard to the question of time, raised by the Solicitor-General, a practice has no doubt grown up of imposing a time limit within which the proceedings must be commenced, but this only applies in the case of private or semi-private offices; and in the case of municipal corporations the period was by 32 Geo. 3, c. 58, fixed at six years. In any event, if the contention that the Act of 1914 has revived s. 3 of the Act of Settlement is well founded, the period of six years would in this case only begin to run from 1914.

On the main question, sub-s. 2 of s. 3 of the Act of 1914 enacts that s. 3 of the Act of Settlement "shall have effect as if the words 'naturalized or' were omitted therefrom." Therefore s. 3 must now be read as providing that "No person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging (although he be made a denizen, except such as are born of English parents) shall be capable to be of the Privy Council." The respondents were born abroad and not of English parents, and therefore they come within the plain language of s. 3 as amended by the Act of 1914. It is said that so much of s. 3 as was not repealed by the Act of 1844, that is, the disqualification for Parliament and the Privy Council, was repealed by implication by the Act of 1870. It is a fundamental rule in the construction of statutes that a subsequent statute in general terms is not to be construed to repeal a previous particular statute, unless there are express words

(1) Lee temp. Hardw. 261.
(2) 10 B. & C. 230.
(3) 28 L. J. (Ch.) 153.
(4) (1875) L. R. 10 C. P. 379.
(5) (1789) 1 East, 46, n.
(6) (1789) 3 T. R. 574, n.
(7) 3 Times L. R. 649.
(8) [1892] 1 Q. B. 399.

to indicate that such was the intention, or unless such an intention appears by necessary implication: *Reg.* v. *Champneys* (1), per Bovill C.J.; *Kutner* v. *Phillips* (2), per A. L. Smith J.; *Fitzgerald* v. *Champneys* (3); Maxwell on Interpretation of Statutes, 5th ed., p. 247. There is nothing in the Act of 1870 to indicate that it was the intention to repeal the remaining portion of s. 3 of the Act of Settlement. Sect. 7 of the Act of 1870 confers upon a naturalized alien the rights, powers and privileges of a natural-born British subject. Those words are not necessarily repugnant to the continuance of the disqualification for membership of the Privy Council. If the effect of the Act of 1870 was to repeal the remaining portion of s. 3 of the Act of Settlement, that section has been re-enacted by sub-s. 2 of s. 3 of the Act of 1914. Sub-s. 2 in express terms says that s. 3 of the Act of Settlement "shall have effect" as if the words "naturalized or" were omitted. It is impossible for a section to have effect if it remains repealed. The alleged inconsistency between sub-s. 1 and sub-s. 2 is met by the words in sub-s. 1, "subject to the provisions of this Act." The Act of 1914 contains nothing to indicate whether its intention was to enlarge or to restrict the rights of aliens; the words used, therefore, must be construed according to the ordinary rules of interpretation. Assuming that the Act of 1870 got rid of the Act of Settlement, the effect was that between 1870 and January 1, 1915 (the date when the Act of 1914 came into operation), it was competent for the respondents to be members of the Privy Council; but from and after January 1, 1915, by reason of the Act of 1914, the respondents were rendered incapable of being Privy Councillors. Part II. of that Act deals with the naturalization of aliens, and the effect of a certificate of naturalization is provided for by s. 3.

[LORD READING C.J. Apart from sub-s. 2 of s. 3 it seems to be clear that a naturalized person might be made a Privy Councillor.]

That is so, if the contention that the provisions of s. 3 of the Act of Settlement as to disqualification for the Privy Council were not repealed by the Act of 1870 is not well founded.

[LUSH J. Do not the words of s. 3, sub-s. 1, indicate that the Act is an enlarging and not a restricting statute?]

(1) (1871) L. R. 6 C. P. 384, 394.

(2) [1891] 2 Q. B. 267, 271.

(3) (1861) 2 J. & H. 31.

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Sub-s. 1 has not given absolute rights; it only gives rights under conditions. From sub-s. 2 it is clear that the Legislature must have thought that s. 3 of the Act of Settlement was still in existence. It may have been wrong in so thinking, but it is to be noted that sub-s. 2, in stating the effect of s. 3 of the Act of Settlement, uses the present tense and says in express terms that s. 3 of the Act of Settlement is "to have effect," and in construing it for this purpose the first question to be answered is where the particular person was born. If he was born out of the United Kingdom or the British dominions he is disqualified from, inter alia, membership of the Privy Council, and that is not affected by the fact that he is a denizen or has been naturalized, unless, indeed, he was of English parentage.

[LORD READING C.J. Your argument involves the result that the Act of 1914 puts a naturalized person in a worse position than he was in before, or than he was under the Act of Settlement.]

Effect must be given to the language used, whatever the consequences may be: *Warburton* v. *Loveland* (1); *Gundry* v. *Pinniger* (2); *Pocock* v. *Pickering* (3); *Abley* v. *Dale* (4); *Richards* v. *McBride* (5); *Hill* v. *East and West India Dock Co.* (6); *Reg.* v. *Bishop of London* (7); *Income Tax Commissioners* v. *Pemsel* (8); *Salomon* v. *Salomon & Co.* (9); *Powell* v. *Main Colliery Co.* (10)

Cur. adv. vult.

1915. Dec. 17. LORD READING C.J. read the following judgment:—Sir Edgar Speyer and Sir Ernest Cassel were called upon by two orders of this Court, made at the instance of Sir George Makgill, to show cause why an information in the nature of a quo warranto should not be exhibited against them to show by what authority they respectively claim to be members of His Majesty's Privy Council for Great Britain. The grounds of the application were that the

(1) (1832) 2 Dow. & C. 480, 489.
(2) (1852) 1 D. M. & G. 502, 505.
(3) (1852) 18 Q. B. 789, 797, 798.
(4) (1851) 11 C. B. 378, 391.
(5) (1881) 8 Q. B. D. 119.
(6) (1884) 9 App. Cas. 448, 464 et seq.
(7) (1889) 24 Q. B. D. 213, 225.
(8) [1891] A. C. 531, 549.
(9) [1897] A. C. 22, 38.
(10) [1900] A. C. 366.

respondents were born out of the kingdoms of England, Scotland, and Ireland and the dominions thereunto belonging and were not born of English parents, and that, therefore, by the statute law they were not capable to be of the Privy Council. It appears from the affidavits filed on behalf of the applicant that Sir Edgar Speyer was born in 1862 outside the King's dominions of alien parents. He then being a German became a naturalized British subject in 1892 and was appointed a member of the Privy Council in 1909. Sir Ernest Cassel was born in 1852 in Germany of alien parents. He became a naturalized British subject in 1878 and was appointed a member of the Privy Council in 1902.

Sir Edgar Speyer did not file evidence, but it was stated at the Bar on his instructions that he had published his offer of resignation and his reasons for taking that course, but that His Majesty was pleased not to accept the offer, and Sir Edgar felt it would be inconsistent for him to appear to assert a claim to a distinction which he had offered to give up, but he was there through his counsel to assist the Court.

Sir Ernest Cassel filed an affidavit claiming that he was lawfully and properly appointed a Privy Councillor and stating that he was deeply attached to this country and valued the honour of being a member of the Privy Council.

The complaint is that both Sir Edgar Speyer and Sir Ernest Cassel have wrongfully and illegally been sworn as members of the Privy Council by reason of the provisions of the Act of Settlement (12 & 13 Will. 3, c. 2), s. 3, and the British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. 5, c. 17), s. 3, sub-s. 2. The question at issue depends upon the construction to be placed on these and other statutes relating to naturalized British subjects.

The Attorney-General, upon whom notice of the orders obtained by Sir George Makgill had been served in accordance with the directions given by this Court, took the preliminary objection on behalf of the Crown that these proceedings were entirely misconceived and that this Court had no jurisdiction to entertain them. He based his objection upon five grounds: (1.) That the wrong (if any) was an usurpation of rights by the Crown, whereas the remedy was only available for usurpation against the Crown of the rights of prerogative of the Crown. (2.) That no judgment in favour of the

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relator could be enforced because it would be an order upon the Crown. (3.) That membership of the Privy Council did not constitute the holding of an office. (4.) That if it did, it was an office held at pleasure. (5.) That the complaint was not a matter for a Crown Office information, but only for information by the Attorney-General.

As to the first ground. The argument of the Attorney-General was that originally a writ of quo warranto was only available for use by the King to protect the King against encroachment of the Royal prerogative or of the rights, franchises, or liberties of the Crown, and that an information in the nature of a quo warranto, which proceeding had taken the place of the old writ of quo warranto, was equally limited in its availability as a remedy. I think this point fails. In early times the writ of quo warranto was in the nature of a writ of right for the King against any subject who claimed or usurped any office, franchise, or liberty, to inquire by what authority he supported his claim in order to determine the right: Blackstone's Commentaries, 8th ed., vol. 3, p. 262. It was a civil writ at the suit of the Crown: *Rex* v. *Marsden.* (1) Originally the writ had to be returned before the King's justices at Westminster, but afterwards only before the justices in eyre by virtue of the Statutes of Quo Warranto, 6 Edw. 1 (Statute of Gloucester) and 18 Edw. 1, statute 2. The writ of quo warranto, however, fell into disuse and led to the substitution of proceedings by way of information in the nature of quo warranto. Whatever the immediate cause of the change or whenever it was brought about is not ascertainable: Tancred on Quo Warranto, p. 2; but the practice of filing informations by the Attorney-General in lieu of these writs is very ancient: *Darley* v. *The Queen.* (2) At a later period the King's coroner commenced the practice of exhibiting information of quo warranto at the instance of private persons, but this power of the King's coroner was much restrained by the statute 4 & 5 Will. & Mar. c. 18, which was passed to prevent malicious informations at the suit of private persons being filed by the King's coroner. In *Rex* v. *Hertford Corporation* (3) it was decided that informations in the nature of quo warranto were within the purview of

(1) 3 Burr. 1817. (2) 12 Cl. & F. 537.
(3) 1 Ld. Raym. 426.

this statute, and thereafter the King's coroner did not file informations without the order of the Court. Subsequently the statute of 9 Anne, c. 20, was passed to render informations in the nature of quo warranto more speedy and effectual and for the more easy trial of the rights of offices and franchises in corporations and boroughs. Since that time there has been a tendency to extend the remedy, subject to the discretion of the Court to grant or refuse informations to private prosecutors according to the facts and circumstances of the case, and hence it is that it becomes so difficult to reconcile many of the decisions, as was pointed out by Lord Brougham in *Darley* v. *The Queen*. (1) In that case the judges were summoned to the House of Lords to give their opinion. The House of Lords adopted the opinion delivered by Tindal C.J., and since then this decision has been the starting point when considering the law relating to quo warranto, and the effect of the earlier cases has been much qualified: *Reg.* v. *Hampden*. (2) Many of the authorities cited to us in the course of the argument were dealt with in that case and reviewed by Tindal C.J. He expressed his conclusion in the oft-quoted words (3): "After the consideration of all the cases and dicta on this subject, the result appears to be, that this proceeding by information in the nature of quo warranto will lie for usurping any office, whether created by charter alone, or by the Crown, with the consent of Parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others." The test to be applied is whether there has been usurpation of an office of a public nature and an office substantive in character, that is, an office independent in title. This decision is an authority against the proposition argued by the Attorney-General. It establishes that, whereas formerly a quo warranto was held to lie only where there was an usurpation of a prerogative of the Crown or of a right of franchise, a proceeding by information in the nature of quo warranto has long since been extended beyond that limit and is a remedy available to private persons within the limits stated by Tindal C.J. and subject always to the discretion of the Court to refuse or grant it. The case of *Reg.* v. *Guardians of St.*

(1) 12 Cl. & F. 537. (2) 6 B. & S. 931.
(3) 12 Cl. & F. 541.

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Martin's (1) takes the same view of the decision of *Darley* v. *The Queen*. (2)

The second ground proceeds upon the assumption that if the Court were to pronounce a judgment of ouster in this case we should be making an order upon the Sovereign. If that were the true view of such a judgment I should, of course, agree, as this Court could not make an order upon the Sovereign. To use the words of Cockburn C.J. in *Reg.* v. *Lords Commissioners of the Treasury* (3), "We must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question. Over the Sovereign we can have no power." But a judgment against the respondents would have effect against them only; it would be an order upon the subject, not upon the Crown. It is then argued that this Court would be powerless to enforce a judgment of ouster in this case, that we could not order the Clerk to the Privy Council, who is the servant of the King, to remove the names from the roll of Privy Councillors, neither could we prevent the immediate reinstatement of the names if the King thought fit to alter it. It is sufficient for the present purpose to say that a judgment pronounced in favour of the relator would not involve the making by this Court of an order upon the Clerk, neither would this Court be powerless to enforce the judgment if it were disobeyed by those against whom it was made. Although it may be interesting and useful for the purpose of testing the propositions under consideration to assume the difficulties suggested by the Attorney-General, none of them would in truth occur. This is the King's Court; we sit here to administer justice and to interpret the laws of the realm in the King's name. It is respectful and proper to assume that once the law is declared by a competent judicial authority it will be followed by the Crown.

The case of *Reg.* v. *Lords Commissioners of the Treasury* (4) was much pressed on us by the Attorney-General, but that was an application for a mandamus, and the Court held that the money had been received by the Lords Commissioners as servants of the

(1) 17 Q. B. 149.
(2) 12 Cl. & F. 520.
(3) L. R. 7 Q. B. 394.
(4) L. R. 7 Q. B. 387.

Crown and that there was no statutory obligation upon the Lords Commissioners to do what the Court were asked to compel them to do by mandamus. The application was based on the statutory obligation, and Blackburn J. thought that if there was such an obligation the Court ought to grant the mandamus.

The third ground depends upon whether or not membership of the Privy Council constitutes the holding of an office, for, if an office, it is clearly of a public nature within the meaning of *Darley's Case.* (1) The term " office " is not here used in a strict sense : *Reg.* v. *Fox* (2) ; and in my judgment to be a Privy Councillor is to hold an office within the meaning of the term as used. Indeed membership involves the taking of an oath of office the text of which is fully set forth in the late Sir William Anson's book on the Law and Custom of the Constitution, 3rd ed., vol. 2, part i., at p. 138. Its terms show conclusively that the position of a Privy Councillor is not merely an honour or dignity ; it imposes obligations of State upon the persons appointed. It was also argued by the Attorney-General that a Privy Councillor was an adviser of the King and that the King could not reclaim the office because he could not become his own adviser, but it is immaterial that the office cannot be reclaimed, as a judgment of ouster would be an effective judgment against the person who had illegally exercised the office : Chitty's Prerogatives of the Crown, p. 336.

The fourth ground is that the office is not of a permanent nature, but is held at pleasure. I have found it difficult to understand why in principle an office held at pleasure should not equally with an office of a permanent character be the subject of this remedy, provided the office be of a public and substantive character, particularly as an office held at pleasure is often in effect of a permanent character. After considering the authorities since *Darley* v. *The Queen* (1) it appears to me that they rest upon the principle formulated in that case and are only the application of it to the particular facts. Tindal C.J., when using the language under consideration, was contrasting the substantive office, that is, the office of an independent character, with the employment of a deputy or mere servant. This is shown by the two questions put by Tindal C.J. (3) :

(1) 12 Cl. & F. 520. (2) 8 E. & B. 945.
(3) 12 Cl. & F. 542.

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"Was it (the office) public? and was the treasurer a mere servant of the Dublin magistrates?" He held that the treasurer was not removable at the pleasure of the magistrates, and must be treated not as their servant, but as an independent officer. That the treasurer was not removable at pleasure was a reason for holding that the office was substantive, but it was not intended, in my judgment, to affirm that removability at pleasure was a conclusive answer. *Reg.* v. *Fox* (1) was much relied upon by the Attorney-General. On examination it appears that the Court discharged the rule for the reason that the guardians could reappoint at once, and, therefore, it was useless to grant the information. In the present case there could be no reappointment, inasmuch as ex hypothesi it would be illegal. *Bradley* v. *Sylvester* (2) was a decision in the exercise of the discretion of the Court. In *Ex parte Parry* (3) Lord Coleridge C.J. and A. L. Smith J. held that the information was not applicable in the case of a registrar of births and deaths, apparently because the office was held at the pleasure of the Registrar-General, but *Reg.* v. *Burrows* (4) decided that an information would lie to inquire into the validity of an election of a clerk to a vestry, and the authority of *Ex parte Parry* (3) was seriously questioned by Mathew J. and A. L. Smith J. No case has been cited of a refusal by the Court of an information where the reappointment to an office held at pleasure would be illegal. It would seem strange that the Court by refusing the remedy should perpetuate illegality. I cannot conceive why the Court should refuse to interfere if the appointing body persisted in retaining in office a person disqualified in law and no remedy other than the information is available. In the present case the information sought is the only means of testing the legality of the appointment, and if, as contended, it is contrary to law, quo warranto would seem in principle a convenient and proper way to obtain a judicial decision to that effect. If the irregularity in the appointment of an office held at pleasure could be cured by immediate reappointment, the Court in the exercise of its discretion would doubtless refuse the information, but if, as in this case, any reappointment would be illegal, I cannot see any sound reason

(1) 8 E. & B. 939.
(2) 25 L. T. 459.
(3) 3 Times L. R. 649.
(4) [1892] 1 Q. B. 399.

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why the Court should not permit the matter to be brought before it.

The last ground is that the remedy in this case can only be sought at the instance of the Attorney-General by an information ex officio, and that the order should be discharged because it is made at the instance of a private person. In support of this contention *Sir William Lowther's Case* (1) and *Ibbotson's Case* (2) were cited. In both cases the grievance was of a private nature and the Court thought they ought to be prosecuted only by the Attorney-General. Lord Hardwicke C.J. said: "We never grant these informations for private usurpations of franchises, but the way is to apply to the Attorney-General in such cases." The distinction is pointed out in Kyd on Corporations, p. 416, to the effect that the power of the Master of the Crown Office is confined to cases concerning the public government, whereas the power of the Attorney-General extends also to cases concerning the private rights of the Crown. In *Rex* v. *Kemp* (3) Lord Kenyon C.J. said: "I do not mean to say that a stranger may not in any case prefer this sort of application; but he ought to come to the Court with a very fair case in his hands," just as the Court thought it right to inquire into the motives of the applicant to see that the application was not made merely to disturb the local peace of corporations: *Rex* v. *Brown* (4), per Ashhurst J. It cannot be doubted that this application concerns public government, and there is no ground for impugning the motives of the relator. A stranger to the suit can obtain prohibition (see *Broad* v. *Perkins* (5)), and I see no reason why he should not in a proper case obtain an information of quo warranto. Sir George Makgill appears to have brought this matter before the Court on purely public grounds without any private interest to serve, and it is to the public advantage that the law should be declared by judicial authority. I think the Court ought to incline to the assistance, and not to the hindrance, of the applicant in such a case if the Court has the power, which I think it has. In my opinion the preliminary objection fails on all grounds.

It now becomes necessary to decide the main question in

(1) 2 Ld. Raym. 1409.
(2) Lee temp. Hardw. 261.
(3) 1 East, 46, n.
(4) 3 T. R. 574, n.
(5) (1888) 21 Q. B. D. 533.

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controversy, that is, whether the appointment of the respondents to the Privy Council was contrary to law. By s. 3 of the Act of Settlement it was enacted that "no person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging (although he be naturalized or made a denizen, except such as a born of English parents) shall be capable to be of the Privy Council or a member of either House of Parliament or to enjoy any office or place of trust either civil or military or to have any grant of lands, tenements or hereditaments from the Crown, to himself or to any other or others in trust for him." I disregard the brackets for the purpose of construing the language: *Duke of Devonshire* v. *O'Connor* (1), per Lord Esher M.R. The words of the section mean that a naturalized subject of the Crown is not capable to be a Privy Councillor unless he is born of English parents. It was not until the British Nationality Act, 1730 (4 Geo. 2, c. 21), was passed that a child born abroad of a man who was by the common law a natural-born British subject became himself a British-born subject, and this privilege was extended to grandchildren by the British Nationality Act, 1772 (13 Geo. 3, c. 21). Before the passing of these Acts the child or grandchild would in general have required to be naturalized to become a British subject: see *De Geer* v. *Stone* (2) and the recent case of *Rex* v. *Superintendent of Albany Street Police Station.* (3) By the exception in the Act of Settlement the disqualification was made inapplicable to such naturalized persons as were born of English parents. There is no statutory obligation on the Crown to appoint any person to the Privy Council, but this section imposes a limitation upon the powers of the Crown with regard to the appointment of naturalized subjects. If that limitation is still in force—that is, if these provisions of the Act of Settlement affecting naturalized persons have not been repealed, expressly or impliedly, by later statutes—the appointment of both the respondents is contrary to law, inasmuch as neither of them was born of English parents. On the other hand, if the provisions of the Act of Settlement are no longer in force, there is no limitation upon the powers of the Crown in this respect, and the respondents were properly appointed under the statute of 1870 (33 Vict. c. 14) and are now capable, subject to a

(1) (1890) 24 Q. B. D. 468, 478. (2) (1882) 22 Ch. D. 243.
(3) [1915] 3 K. B. 716.

question raised as to the effect of the Act of 1914 (4 & 5 Geo. 5, c. 17), of being members of the Privy Council. Under the Act of Settlement the disqualifications of a naturalized person not born of English parents were these: (1.) that he could not be of the Privy Council, or (2.) a member of either House of Parliament, or (3.) enjoy any office or place of trust either civil or military, or (4.) have any grant of lands from the Crown. At the time of the Act of Settlement naturalization was obtained by means of a Bill in Parliament for that purpose, and so jealous was Parliament of this provision limiting the capacity of naturalized subjects that it passed the statute 1 Geo. 1, c. 4, which enacted that no Bills of naturalization should be received in either House of Parliament unless words in effect preserving the limitations prescribed by the Act of Settlement were inserted. In 1844 an Act was passed to amend the laws relating to aliens (7 & 8 Vict. c. 66) and to enable the rights and capacities of British subjects to be granted to aliens, subject to the conditions and restrictions imposed by that Act. It repealed the above-mentioned provision of the statute of 1 Geo. 1, c. 4, and extended the rights of aliens with regard to the holding of real and personal estate (ss. 2, 3, and 4), and by s. 6 enabled aliens to become naturalized upon obtaining a certificate from the Secretary of State and taking the prescribed oath. An alien who complied with the conditions imposed by the Act "shall enjoy all the rights and capacities which a natural-born subject of the United Kingdom can enjoy or transmit, except that such alien shall not be capable of becoming of Her Majesty's Privy Council, nor a member of either House of Parliament." Naturalization under the Act of 1844, therefore, gave to the naturalized subject all the rights of a natural-born subject save that the first and second limitations or disqualifications under the Act of Settlement were still preserved (ss. 6 and 8). The Act of 1844 repealed such parts of the Act of Settlement as were inconsistent with the provisions of the later Act (s. 1). The effect of the repeal was that an alien naturalized under this Act could therefore enjoy an office or place of trust, whether civil or military, or have a grant of lands from the Crown.

In 1870 Parliament again amended the law relating to the legal condition of aliens and British subjects. By the Naturalization Act, 1870 (33 & 34 Vict. c. 14), the statute of 1844 was repealed and further

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facilities were given to an alien to obtain a certificate of naturalization (s. 7). It enacted that "an alien to whom a certificate of naturalization is granted shall in the United Kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom." The only qualification stated is that he shall not, when within the limits of the foreign State of which he was a subject before he obtained naturalization, "be deemed to be a British subject unless he has ceased to be a subject of that State." No reference is made in this Act to the Act of Settlement or to the limitations preserved under the Act of 1844 as to membership of the Privy Council or of Parliament. The words "shall be entitled to all political and other rights, powers, and privileges . . . . to which a natural-born British subject is entitled" in their natural meaning must be held to exclude any qualification except that expressly mentioned which is above quoted. The two limitations preserved by the repealed Act of 1844 disappeared in the Act of 1870, and the language of this Act is inconsistent with their continued existence. In my judgment this statute of 1870 cannot be read otherwise than as extending the rights and capacities of naturalized subjects. Be it observed also that it gave an alien who had been naturalized previously to the passing of this Act the right to apply for his certificate under the later Act. This again shows that Parliament intended to give greater rights to persons naturalized under the Act of 1870 than could hitherto have been granted. If this statute is to be construed, as I think it must, as extending the rights of naturalized subjects, it cannot be read as impliedly re-imposing the limitations repealed by the Act of 1844 or which had been expressly preserved by that Act. If Parliament intended to preserve those limitations, it is inconceivable that no reference should have been made to them in the Act which expressly repealed the statute preserving two of the four original limitations and in terms gave the same political and other rights to a naturalized subject as were enjoyed by a British subject. The conclusion is irresistible that the statute of 1870 by implication repealed such of the limitations originally imposed by the Act of Settlement as were preserved by the Act of 1844. Therefore the respondents having been naturalized under the Act of 1870 were

capable of being Privy Councillors when they were respectively appointed.

But Mr. Powell, who so ably argued this case for the relator, contends that since the Act of 1914 they ceased to be capable of being Privy Councillors inasmuch as s. 3, sub-s. 2, of this Act (4 & 5 Geo. 5, c. 17) re-enacts s. 3 of the Act of Settlement. The Act of 1914 is entitled "An Act to consolidate and amend the Enactments relating to British Nationality and the Status of Aliens." By sub-s. 1 of s. 3 a naturalized subject shall be entitled to "all political and other rights powers and privileges" to which a natural-born British subject is entitled, and shall, "as from the date of his naturalization, have to all intents and purposes the status of a natural-born British subject." These words are definite and precise, but it is contended that sub-s. 2 must be read as qualifying this language. The argument is that the sub-section means that s. 3 of the Act of Settlement is either still in force or re-enacted and is amended. I cannot so read this section of the Act of 1914. As I have already held, the section of the Act of Settlement was not in force as regards naturalized subjects at the time of the passing of the Act of 1914. If the argument for the relator is right and the section of the Act of Settlement is re-enacted, it follows that the status of a naturalized subject would be worse under this statute than it was either before or under the Act of 1844, for he could not under the suggested construction hold an office or place of trust or a grant of lands from the Crown. Again, and looking only at the language of the Act of Settlement, if the words "naturalized or" are omitted, a denizen born of English parents will be in a better position than a naturalized subject who, if he is born of English parents, will again be worse off than he was under the Act of Settlement. I cannot read the words in sub-s. 2 as cutting down the meaning of sub-s. 1, and I hold that the effect of the section is to give to the naturalized subject to all intents and purposes the status of a British subject without any qualification. This statute repealed the Act of 1870 and, it is to be observed, does not re-enact the one qualification in the Act of 1870 as to the status of a naturalized subject. The Act of 1914 was intended to extend and not to curtail the rights of naturalized subjects and aliens. Mr. Powell relied upon the words of sub-s. 1 of s. 3 of the Act of 1914 "subject

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to the provisions of this Act" as showing that sub-s. 1 was qualified by sub-s. 2. It is to my mind obvious that these words were inserted because of the powers given to the Secretary of State to revoke a certificate. In any event I think s. 38, sub-s. 2, of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), is fatal to Mr. Powell's argument, for, assuming that his argument upon s. 3 of the Act of 1914 is right, the repeal would not affect the previous operation of the Act of 1870 or anything done under it. Unless a contrary intention appears in the Act of 1914, anything done under the Act of 1870 remains valid. I cannot find any language in the Act of 1914 to indicate a contrary intention.

In my judgment the contentions on behalf of the relator fail, and the orders must be discharged as regards Sir Edgar Speyer without costs, and as regards Sir Ernest Cassel with costs.

AVORY J. read the following judgment:—The affidavits upon which the rules in these cases were granted allege that Sir Ernest Cassel and Sir Edgar Speyer, having been born out of the kingdoms of England, Scotland, and Ireland, and the dominions thereunto belonging, and not born of English parents, were by reason thereof incapable by law to be of the Privy Council, and were wrongfully and illegally sworn as, and wrongfully and illegally remain, members thereof. The determination of this question depends upon the construction to be placed upon s. 3 of the Act of Settlement, 1700, and various subsequent statutes relating to the naturalization of aliens. It is difficult to imagine a question more fit for determination in a Court of law, and I know of no authority in the Constitution competent to determine it other than the Courts of law, but the Attorney-General, appearing on behalf of the Crown, has submitted that the Court has no jurisdiction to entertain or decide the question.

Before dealing specifically with the five grounds upon which the contention was based, I wish to observe that s. 3 of the Act of Settlement must in my opinion be regarded as an abridgment or curtailment of the prerogative right of the Sovereign to appoint whomsoever he pleases to be of the Privy Council to which he has given the Royal assent. It is, therefore, a statute which necessarily binds the Crown, and s. 4 of the Act of Settlement seems of itself a

sufficient answer to the objection as to the jurisdiction of the Court. That section contains this recital: "And whereas the laws of England are the birthright of the people thereof, and all the Kings and Queens, who shall ascend the throne of this realm, ought to administer the government of the same according to the same laws, and all their officers and ministers ought to serve them respectively according to the same."

The maxim "The King can do no wrong," which is sometimes misunderstood, and which only means that His Majesty individually and personally and in his natural capacity is independent of, and not amenable to, any other earthly power or jurisdiction, has no application to the present case. The King is the fountain head of justice, and the power of declaring his laws is entrusted to his judges. It is a fundamental general rule that the King cannot sanction any act forbidden by law. It is in that point of view that His Majesty is under and not above the laws, that he is bound by them equally with his subjects: see Chitty's Prerogatives of the Crown, p. 5, and Bracton, bk. 1, ch. 8; and it has been held that a grant from the Crown contravening the statute law is void: see *Shiffner* v. *Gordon*. (1) Moreover it is conceded that if the remedy by quo warranto does not lie in this case there is no other remedy, so if the contention of the Attorney-General prevails so much of s. 3 of the Act of Settlement as relates to the Privy Council was and is of no effect.

The five grounds upon which the Attorney-General based his objection to the jurisdiction of this Court were: First, that an illegal appointment to the Privy Council does not invade the Royal prerogative, as the only complaint is of a wrong committed by the Crown, that this is not a case where some one is found to be exercising or usurping some franchise or privilege of the Crown, that the original writ of quo warranto was a civil action at the suit of the Crown to inquire by what right a subject was usurping some franchise or privilege of the Crown, and that the remedy by information in the nature of quo warranto which has taken its place should be confined to similar cases.

It is no doubt true that the writ in its origin was of this nature, but it is clear from the provisions of 4 & 5 Will. & Mar. c. 18, which were held to apply to informations in the nature of quo warranto,

(1) (1810) 12 East, 296.

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that such informations were not at that time so restricted in their operation, and the subsequent statute, 9 Anne, c. 25 (c. 20 in Ruff.), which is limited to corporate offices, expressly authorizes any person to initiate such proceedings as relator; and finally the case of *Darley* v. *The Queen* (1), in which all previous cases were collected and reviewed, appears to afford a conclusive answer to this ground of objection, as it was there held that the remedy by quo warranto would lie at the instance of a private relator for usurping any office, whether created by charter alone or by Act of Parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others; and see per Lord Brougham (2), where he says: "I do not think it necessary nowadays to show, that because a quo warranto was formerly only held to lie where there was an usurpation of franchise, or of a Royal franchise, or of a matter proceeding from the prerogative of the Crown, therefore, an information in the nature of a quo warranto, which, generally speaking, follows the same rule, is to be confined within the same strict rules." The case of *Reg.* v. *Lords Commissioners of the Treasury* (3) was relied on as showing that no such remedy could apply to an act done by the Crown; but that was a case of mandamus involving an order on the servants of the Crown, in which the Court held that no duty to the appellant was disclosed, and, apart from the distinction which arises in cases of mandamus, I think the subsequent case of *Rex* v. *Lords Commissioners of the Treasury* (4), in which it was held that mandamus would lie to the Lords Commissioners of the Treasury to compel performance of a statutory duty, is much more analogous to the present case.

The second ground relied on was that no judgment of this Court upon such an information could be enforced against the Crown. The answer is that a judgment of ouster pronounced against the respondents does not involve any order upon the Crown, and the respondents, if they persisted in acting in disobedience to it, might be liable to indictment: see Russell on Crimes, 7th ed., vol. 1, p. 542; *Reg.* v. *Mortlock* (5); *Rex* v. *Jeyes* (6); and I think it should be

(1) 12 Cl. & F. 520.
(2) 12 Cl. & F. 545.
(3) L. R. 7 Q. B. 387.
(4) [1909] 2 K. B. 183.
(5) (1845) 7 Q. B. 459.
(6) (1835) 3 Ad. & E. 416.

assumed that in the event of such a judgment any necessary order for the removal of the respondents' names from the roll of Privy Councillors would be given.

The third ground relied on was that membership of the Privy Council was not an "office," that the "office" to which this remedy relates must be one that ought to belong to the Crown, and that can be reclaimed by the Crown, and that the Crown cannot hold the office of adviser to itself. It is, I think, sufficient to refer to the oath of office which has to be taken by a Privy Councillor, which is set out in Anson's Law and Custom of the Constitution, and to Comyns' Digest, title "Office," where Privy Councillors will be found classified under the head "Officers of State," and to Chitty's Prerogatives of the Crown, p. 336, where it is said: "Nor is it material that the franchise is of such a nature that it cannot be seized into the King's hands or held by him, though judgment be given for His Majesty, because the defendant may still be ousted." I do not think this point was seriously pressed, except in conjunction with the fourth ground, namely, that the office being held at pleasure only could not be the subject of this remedy, and the opinion of the judges delivered by Tindal C.J. in *Darley* v. *The Queen* (1) was relied upon by the Attorney-General in support of this proposition. But, in my opinion, neither this nor any other case that has been cited is an authority for the bare proposition that an office held at pleasure only cannot be the subject of this remedy. Tindal C.J. in the passage referred to is drawing the distinction between an office of a public nature and substantive in its character (that is independent), and the function or employment of a deputy or servant held at the will or pleasure of others; as to the latter he says the remedy will not lie, and he then proceeds to his conclusion that the county treasurer in that case held an office of a public nature, and was an independent officer, and not a mere deputy or servant, and that the remedy therefore would lie. The Lord Chancellor and Lord Brougham both based their opinions on the same view of the independence of the office. I do not think it can be doubted that a Privy Councillor holds an office of a public nature and a substantive or independent office and is not a mere deputy or servant, although he may be dismissed at

(1) 12 Cl. & F. 542.

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pleasure, nor can I see any reason in principle why a person who ex hypothesi has been wrongly admitted to an office of this nature, and who unless the judgment of this Court is against him presumably will retain it, should be permitted to say in answer to the present application that he only holds the office at pleasure. The case of *Reg.* v. *Fox* (1), where the remedy of quo warranto was held not applicable to the case of a clerk to borough justices, was decided, as appears from the argument and the judgment of Crompton J., on the ground that the office was not an independent office of a public nature; and in the more modern case of *Reg.* v. *Burrows* (2) it was held that quo warranto would lie in the case of a clerk to a parish vestry notwithstanding the argument that he held office at the will of the vestry subject to the veto of the Local Government Board, who could themselves dismiss him.

Finally it was contended by the Attorney-General that the only remedy, if any, in the present case was by way of information ex officio to be filed by the Attorney-General himself, which means that there is no remedy so long as he holds the view set forth in his argument. In *Darley* v. *The Queen* (3) the counsel for the defendant in error, who was a private relator, quoted from Kyd on Corporations the following passage: "By an examination of the cases, the distinction between the power of the Attorney-General and the Master of the Crown Office seems to be this,—that the power of the latter is confined to cases which concern the public government, whereas the power of the former extends also to cases which only concern the private rights of the Crown." I think the present case is one which concerns and might vitally concern the public government, and in *Rex* v. *Brown*, reported in a note to *Rex* v. *Smith* (4), Ashhurst J. said: "The ground on which this application is made is to enforce a general Act of Parliament, which interests all the corporations in the kingdom; and therefore it is no objection that the party applying is not a member of the corporation"; and although the Court in the exercise of its discretion may have refused in some instances the application of a mere stranger, I think the principle on which Brett J., as he then was, in *Worthington* v.

(1) 8 E. & B. 945.
(2) [1892] 1 Q. B. 399.
(3) 12 Cl. & F. 533.
(4) 3 T. R. 573, 574, n.

Jeffries (1) said the Court ought to act in prohibition should be applied to such a case as that now before the Court—that is, there should not be "any distinction in the action of the superior Court dependent upon the means by which, or the persons by whom, it is informed of the breach of order, which is a breach of the prerogative." If information is given by a stranger "order is no less broken, the prerogative is no less invaded." For these reasons I think the preliminary objection as to the jurisdiction of the Court should be overruled.

The Solicitor-General has called attention to a further objection which applies only to the case of the respondent Sir Ernest Cassel, namely, the lapse of time, and the rule laid down by this Court in 1791 in the case of *Rex* v. *Dicken* (2) limiting the time for applications of this nature to six years. It is not necessary under the circumstances to decide this point, but as at present advised I doubt if there is any authority for Mr. Powell's contention in answer that the rule only applies to private or quasi-private offices.

I proceed now to consider the question of law arising on the statutes, which is whether at the time these gentlemen were respectively appointed members of the Privy Council, namely, in 1902 and 1909, they were disqualified from holding that office by reason of the provisions of s. 3 of the Act of Settlement, 1700 (12 & 13 Will. 3, c. 2). It is not disputed that if so much of that section as relates to the Privy Council was still in force in 1902 or 1909 they were disqualified; but it is contended on their behalf that this disqualification was impliedly repealed and removed by the Naturalization Act, 1870 (33 & 34 Vict. c. 14). On behalf of the relator it is contended that even if such repeal could be implied from the Act of 1870, which is disputed, the provisions of the Act of Settlement have been revived or re-enacted by s. 3, sub-s. 2, of the British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. 5, c. 17), so as to operate as a disqualification from continuing to hold the office, and that the last-mentioned sub-section ought to be construed as a recognition by the Legislature that the provisions of s. 3 of the Act of Settlement were up to that date, namely, August, 1914, in full force.

Some discussion has taken place as to the true construction of

(1) L. R. 10 C. P. 382. (2) 4 T. R. 282.

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s. 3 of the Act of Settlement having regard to the words enclosed in brackets as they appear in the printed copy of the statute, which appears to me to be irrelevant to the cases here in question; but I cannot see any reason to doubt that the plain meaning, either with or without the brackets, is that a person not born of English parents, although naturalized, shall not be capable, &c., and that a person born of English parents, if naturalized, shall be capable, &c. At the time this statute was passed a child born abroad of English parents was not in law a British subject. It becomes necessary, therefore, to consider in the first place to what extent s. 3 of the Act of Settlement was in force when the Naturalization Act, 1870, was passed. In the year 1844 an Act to amend the law relating to aliens (7 & 8 Vict. c. 66) was passed, which, after reciting the Act of Settlement and other Acts, enacted in ss. 4 and 5 that aliens being the subjects of a friendly State might take and hold personal property and land and houses for the purpose of residence and occupation for a certain term as if they were natural-born subjects of the United Kingdom, and in s. 6 that aliens residing in or thereafter coming to reside in any part of Great Britain or Ireland with intent to settle therein who shall have obtained a certificate of naturalization under that Act "shall enjoy all the rights and capacities which a natural-born subject of the United Kingdom can enjoy or transmit, except that such alien shall not be capable of becoming of Her Majesty's Privy Council, nor a member of either House of Parliament, nor of enjoying such other rights and capacities, if any, as may be specially excepted in and by the certificate" of naturalization. Although this statute does not expressly repeal any of the provisions of s. 3 of the Act of Settlement, it does, in my opinion, by necessary implication, in the case of a person naturalized under the later Act, repeal so much of them as disqualifies him from enjoying any office or place of trust other than a member of the Privy Council and of the Houses of Parliament or from having any grant of land, &c., from the Crown. In other words, a person naturalized under the Act of 1844 became, subject to any exception in the certificate, qualified to hold any office or place of trust, civil or military, except that of a member of the Privy Council or of the Houses of Parliament, and to have a grant of lands, &c., from the Crown.

Coming now to the Naturalization Act of 1870, "An Act to amend the Law relating to the legal condition of Aliens and British Subjects," we find, in the first place, an express repeal of the Act of 1844 and the substitution therefor of provisions in s. 2 which enlarge the powers of aliens to take and hold every description of real and personal property in the United Kingdom, and of provisions in s. 7 which enlarge the rights and privileges of an alien naturalized under the later Act. This s. 7 recognizes the right of a naturalized alien to serve under the Crown, and the only restriction upon the rights, powers, and privileges to which he is entitled as if he were a natural-born British subject is that he shall not, when within the limits of the foreign State of which he was a subject previously to his naturalization, be deemed to be a British subject unless he has ceased to be a subject of that State in pursuance of the laws thereof or of a treaty to that effect. The special disqualification of the naturalized alien from becoming a member of the Privy Council or of the Houses of Parliament and the power to except particular rights and capacities in and by the certificate disappear, and s. 7 further provides that an alien naturalized previously to the passing of the Act may obtain a certificate of naturalization under that Act upon the same terms as if he had not been previously naturalized. Under these circumstances, applying the well-known rule of construction that if two statutes cannot possibly stand together in operation the later impliedly repeals the earlier, the question is whether so much of the Act of Settlement as disqualifies a naturalized alien from becoming a member of the Privy Council can possibly remain in operation in view of the statute of 1870, which, while repealing the special disqualification of the naturalized alien under the Act of 1844 to be a member of the Privy Council, enacts that he shall be entitled to all political and other rights, powers, and privileges to which a natural-born British subject is entitled in the United Kingdom with the simple qualification hereinbefore mentioned. In my opinion it is not possible, without doing violence to the plain meaning of the words in the later statute; and as both the gentlemen in question were naturalized and held certificates of naturalization under the Act of 1870, they were not in my opinion at the time they were appointed disqualified from holding the office.

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The remaining question is whether the British Nationality and Status of Aliens Act, 1914, has altered the position so far as they are concerned. It is intituled "An Act to consolidate and amend the Enactments relating to British Nationality and the Status of Aliens," and it repeals the Act of 1870. In my opinion a short answer to the point made on behalf of the relator under s. 3 of the statute is to be found in s. 38, sub-s. 2, of the Interpretation Act, 1889, which enacts, "Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not—(*a*) revive anything not in force or existing at the time at which the repeal takes effect; or . . . . (*c*) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed." If I am right in my construction of the Act of 1870, then the repeal did not revive the provisions of the Act of Settlement which are in question here, and did not affect the right or privilege to be a member of the Privy Council acquired or accrued under the Act of 1870; but it is contended that the contrary intention appears in s. 3, sub-s. 2, of the Act of 1914, and it becomes necessary, therefore, to consider the terms of that section and the construction which on behalf of the relator it is suggested should be put upon it. It is suggested that the effect of this sub-section coupled with the express repeal in s. 28 and Sched. III. of the words "naturalized or" is to re-enact, or to recognize as being still in force, all the remaining words of s. 3 of the Act of Settlement. The terms in which the sub-section is drafted and the fact that it received the final sanction of the Legislature after the outbreak of the present war encourage the argument; but having regard to the provisions of sub-s. 1 of s. 3 of the Act of 1914, which must be read in conjunction with sub-s. 2, and which further enlarges the rights of the naturalized alien by conferring upon him "to all intents and purposes the status of a natural-born British subject," and having regard also to the provisions of s. 6 of the Act of 1914 which enable an alien naturalized before the passing of the Act to obtain a certificate under that Act, I am unable to adopt this suggested construction of sub-s. 2. In my opinion the true effect and meaning of it read in conjunction with sub-s. 1 is to remove the disqualification of the naturalized alien which attached to him under the Act of Settlement,

and thus to avoid a conflict between the two statutes. If this is so, there is no apparent intention either to revive the Act of Settlement so far as it applies to naturalized aliens or to affect any rights or privileges acquired or accrued under the Act of 1870; and the Interpretation Act, 1889, therefore applies and the rights and privileges acquired by the respondents under the Act of 1870 are preserved.

For these reasons I come to the conclusion that the respondents were not at the time of their appointment, and have not been at any time since, disqualified by law for the reasons alleged from being members of the Privy Council.

LUSH J. read the following judgment:—The Attorney-General has raised by way of preliminary objection several contentions for the purpose of showing that, even if the appointment of the two respondents to be of His Majesty's Privy Council is forbidden by statute, the Court has no jurisdiction to hear the complaint or make any order. I do not propose to deal with them in any great detail. They have been very fully dealt with in the judgments of the Lord Chief Justice and my brother Avory, with which I agree. I will briefly state my reasons for thinking that the preliminary objection fails.

There was no doubt a time at which the old writ of quo warranto was used exclusively in order to prevent encroachments on the King's prerogative. But as times changed the nature and scope of the writ became enlarged, and even before the case of *Darley* v. *The Queen* (1) the proceeding by way of information in the nature of quo warranto which had taken the place of the older writ had come to have a far wider application. It is the process by which persons who claim to exercise public functions of an important and substantive character, by whomsoever appointed, can be called to account if they are not legally authorized to exercise them. It seems to me to be clear that there is now no such limitation upon this process as that for which the Attorney-General has contended. It has been constantly used for purposes other than that of preventing encroachments upon the King's prerogative, as I think the

(1) 12 Cl. & F. 520.

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case of *Darley* v. *The Queen* (1) itself shows. By means of this information and the writs of mandamus and prohibition this Court can and does exercise control on all persons who hold public offices—and the appointment of a person to be a member of the Privy Council is, I think, clearly the appointment of an officer—and discharge public duties, either judicial or otherwise; they are the processes by which this Court compels them to discharge those duties according to law if they fail to do so, or prohibits them from acting if they have no lawful authority to do so. The process is enforced for the benefit of the community, and is the only available remedy if the office is either abused or usurped. That any subject can call the attention of the Court to any excess of authority on the part of an inferior Court and apply for prohibition is clear, and in my opinion the same principle applies in the case of an information in the nature of a quo warranto. Every subject has an interest in securing that public duties shall be exercised only by those competent to exercise them, and I think that there is no foundation for the contention that only the Attorney-General can apply for the process which has been invoked in the present case.

The Attorney-General has also argued that, inasmuch as the Court cannot enforce any order it may make in the present case against the Sovereign, it cannot make any order. Again, I disagree with this argument. The order of ouster, if it should be made, would be made against the subject, and if he should in such a case disobey the order the Court would not be powerless to enforce it. But there is another answer to this contention, and it is this. This Court is the only authority which can declare what the law is, and would be declaring it as a guidance to the Sovereign, whose Court it is. We could not assume—and the Attorney-General did not, of course, really suggest that we should—that the Sovereign would disregard the law when declared and expounded by his own Court. The consequences that he suggests are argumentative and not real, and we cannot regard them as fettering the exercise of our jurisdiction.

The last contention—namely, that the office is not a permanent one—does undoubtedly derive some weight from the expressions that have been used in some of the judgments in the cases cited to

(1) 12 Cl. & F. 520.

us. Those expressions do appear to indicate that if an office is held during pleasure and is not of a permanent character the Court will not make any order. But the origin of this dictum was this. The Court will not make an order of ouster, or even entertain the application, if the office is of a subordinate and inferior character and if the duties are of a private or quasi-private character. If a person is appointed to such an office to act as the deputy or servant of another who can be dismissed at the pleasure of that other person, the Court will not interfere. That is, in my opinion, all that was intended when the permanence of the tenure of the office was spoken of as being necessary to justify the interference of the Court. An office may for all practical purposes be of as permanent a character although the holder of it in form only holds it during the pleasure of the Sovereign as if he were appointed for life or for a term of years. It would be strange if, when a statute made it unlawful for a particular person to hold a specific office, the difficulty could not be got over by that person taking or holding it only "during pleasure," and in my opinion there is no real foundation for the argument.

There is, I think, nothing in the suggestion that the lapse of time causes a difficulty.

For these reasons I think that the preliminary objection fails.

Turning to the main question, the case appears to me to be free from any serious difficulty. Until the Naturalization Act, 1870, came into operation a naturalized alien was not qualified to be a member of the Privy Council or to sit in Parliament. The disability created by the Act of Settlement had been expressly preserved by statute up to and including the Aliens Act, 1844, and other disabilities had been removed subject to the power which was reserved by the last-mentioned Act to insert special disabilities in the certificate of naturalization. The Act of 1870, however, repealed the Act of 1844, and for the first time by s. 7 a naturalized alien became "entitled to all political and other rights, powers, and privileges," and "subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom." The only qualification was this, that if he was within the limits of the State of which he had been a subject he was not to be deemed a British subject

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unless he had become denationalized there. Now, if the Legislature had intended to continue this special disability which had been expressly preserved by the Act of 1844, which was being repealed by this very Act, it is impossible, I think, to suppose that it would not have been in terms excepted from the political and other rights which it was conferring on naturalized aliens. "All" rights were given to them. Why are we to restrict these words and hold that only some rights were intended? I not only see no good reason for restricting them, but I see every reason to give them their full and proper significance. Sect. 3 of the Act of Settlement had not been expressly repealed by the Act of 1844 and therefore would be in force after the Act of 1870 had repealed the Act of 1844, unless it was itself repealed by the Act of 1870 by necessary implication. If its provisions are inconsistent with the provisions of s. 7 of the Act of 1870 it would be repealed by necessary implication. Its provisions are, in my opinion, clearly inconsistent with s. 7. The only possible conclusion, therefore, I think, is that it was impliedly repealed, and from that time a naturalized alien was qualified to be a member of the Privy Council and a member of either House of Parliament, for which he had theretofore been disqualified. This is sufficient to dispose of the case, but the matter does not rest there. In 1914 the British Nationality and Status of Aliens Act was passed, still further enlarging the rights and privileges of naturalized aliens. By that Act the Act of 1870 is repealed. Sect. 3, sub-s. 1, enacts that "A person to whom a certificate of naturalization is granted . . . . shall, subject to the provisions of this Act, be entitled to all political and other rights powers and privileges, and be subject to all obligations, duties and liabilities, to which a natural-born British subject is entitled or subject, and, as from the date of his naturalization, have to all intents and purposes the status of a natural-born British subject." Subject to what may be said as to sub-s. 2, the apparent object of the additional provision as to status contained in that sub-section was to remove even the last surviving disability which s. 7 of the Act of 1870 had imposed in case the holder of the certificate of naturalization became resident in the foreign State of which he had been a subject and in which he had not been denationalized. Possibly also it was added to remove all possible doubt as to the scope of s. 7

of the earlier Act. But sub-s. 2 has furnished an argument for the relator. It runs thus: "Section 3 of the Act of Settlement (which disqualifies naturalized aliens from holding certain offices) shall have effect as if the words 'naturalized or' were omitted therefrom." The argument is this. If you omit the words "naturalized or" from s. 3 of the Act of Settlement, so that they are not referred to by name in that section, then, as no person can be a Privy Councillor who was born out of the United Kingdom, neither aliens nor naturalized aliens can be Privy Councillors; nor can they on that argument hold any office or place of trust. In that view of sub-s. 2 it not only takes away very many of the political and other rights which have just been given by sub-s. 1, but it makes the position of a naturalized alien worse than it was under the Act of 1844, because under that Act he could hold an office or place of trust. But it even goes further than that; his position is worse than it was under the Act of Settlement, for this reason: s. 3 of that Act provides by the clause in parenthesis that if the parents of a naturalized alien or a denizen were English-born subjects, he is capable of being a member of the Privy Council or a member of either House of Parliament; if they are omitted altogether from the section he loses this privilege although denizens retain it. It is only necessary to state the argument to refute it. Sub-s. 2 is not happily worded, but its meaning, I think, is clear. It refers to s. 3 of the Act of Settlement as disqualifying naturalized aliens from holding certain offices, and when it says that that section is to have effect as if the words "naturalized or" were omitted therefrom it means as if naturalized aliens were omitted from the category of disqualified persons. This is, I think, a perfectly possible reading of the subsection. I think it is clear that that is what it means. That contention makes the whole of the section consistent and intelligible. The other makes it inconsistent and unreasonable. Now, if the Act of 1914 has removed the disability, then the application by the complainant fails, even if the Act of 1870 has not done so, because although the respondents have not obtained certificates of naturalization under the Act of 1914, they are entitled to apply for and obtain them. They are not now, at all events, personally disqualified from being Privy Councillors. Under those circumstances the Court would not make an order ousting them from their office, as the

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existing defect, if there is one, could be cured, and they could be reappointed.

For these reasons I think that the rules should be discharged.

Rules discharged.

Solicitors for relator: *Cree & Son.*

Solicitor for Clerk to the Privy Council and Home Secretary: *Treasury Solicitor.*

Solicitors for respondent Speyer: *Williamson, Hill & Co.*

Solicitors for respondent Cassel: *Lewis & Lewis.*

F. O. R.

C. A.
1915
Nov. 5.

[IN THE COURT OF APPEAL.]

BARNARD *v.* FOSTER.

[1914 B. 4058.]

Stock Exchange—Stockbroker and Client—Purchase of Shares—Resale at a Loss—Power of Stockbroker to resell without the Leave of the Court—Courts (Emergency Powers) Act, 1914 (4 & 5 *Geo.* 5, *c.* 78), *s.* 1, *sub-s.* 1 (*b*).

By 4 & 5 Geo. 5, c. 78, s. 1, sub-s. 1, "From and after the passing of this Act no person shall . . . . (*b*) levy any distress, take, resume, or enter into possession of any property, exercise any right of re-entry, foreclose, realise any security (except by way of sale by a mortgagee in possession), forfeit any deposit, or enforce the lapse of any policy of insurance to which this subsection applies, for the purpose of enforcing the payment or recovery of any sum of money to which this subsection applies, or, in default of the payment or recovery of any such sum of money, except after such application to such Court and such notice as may be provided for by rules or directions under this Act."

In July, 1914, the plaintiff, a stockbroker on the London Stock Exchange, bought from a jobber certain shares on the instructions of the defendant. The plaintiff paid the jobber for the shares, but, as the defendant declined to take delivery and pay for them at the settlement, the plaintiff sold them at a loss, and sued the defendant for the difference between the money paid for them and the amount which they realized at the resale:—

Held, that, assuming (but without deciding) that the shares were a "security" within the meaning of that term in s. 1, sub-s. 1 (*b*), of the Courts (Emergency Powers) Act, 1914, the plaintiff was at

the time he realized a mortgagee in possession, and was therefore entitled to realize the security without first obtaining the leave of the Court.

Decision of Sankey J. [1915] 2 K. B. 288 affirmed on different grounds.

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APPEAL from a decision of Sankey J., sitting in the Commercial Court; reported [1915] 2 K. B. 288.

The plaintiff, who was a stockbroker on the London Stock Exchange, claimed 142*l.* 19*s.* 8*d.* from the defendant in connection with the purchase and sale of certain shares and for interest.

On July 30, 1914, the plaintiff, on the instructions of the defendant, bought, subject to the rules and regulations of the Committee of the Stock Exchange, 100 Canadian Pacific Railway shares at 165½ from P. S. Coombe & Co., jobbers, for the mid-August account, which had been previously fixed by the Stock Exchange Committee for August 13. On July 31 the Stock Exchange Committee passed a resolution that "bargains open for the ordinary mid-August account be settled at the date fixed for the end-August account, namely, Thursday, August 27." On August 6 the Moratorium Proclamation issued under the Postponement of Payments Act, 1914, came into force, by which it was declared that payments in respect of any contract made before the date of the Proclamation were postponed, but, if not otherwise carrying interest, that they should, if specific demand was made for payment and payment was refused, carry interest as from the date on which they became due and payable at the Bank of England rate current on August 7, 1914: that rate was 6 per cent. On August 11 the plaintiff wrote to the defendant making specific demand for payment on or before August 13, and stating that if payment was refused the 6 per cent. rate of interest would come into effect; the letter concluded as follows: "We make to deliver you 100 Canadian Pacific shares," words which Sankey J. held to mean "I am in a position to deliver you the shares and intend to do so." On the same day the jobbers from whom the shares were bought wrote a similar letter to the plaintiff. Further resolutions were passed by the Stock Exchange Committee on August 12, September 4, and October 2, by which the settlement of bargains was further postponed to November 18. On November 11 and again November 19

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the plaintiff gave notice to the defendant requiring him to take up the shares and stating that unless he did so by November 21 they would be sold. As the defendant did not take up the shares, the plaintiff sold them and now sued the defendant to recover (1.) the difference in price between the shares as bought by him from the jobbers and the price as sold, and (2.) interest since August 13 at 6 per cent. Sankey J. held that the shares were not a "security" within the meaning of that term in s. 1, sub-s. 1 (*b*), of the Courts (Emergency Powers) Act, 1914 (1), as they never belonged to the defendant, and therefore that the plaintiff was entitled to sell them without applying to the Court under that statute.

The defendant appealed.

The Defendant in person. The point of substance is that the sale was wrongful having regard to the provisions of the Courts (Emergency Powers) Act, 1914. The share certificates were a security within the meaning of s. 1, sub-s. 1 (*b*), of that Act, and as the plaintiff realized his security without first obtaining the leave of the Court, as required by the Courts (Emergency Powers) Act, 1914, the sale was wrongful and the plaintiff is liable in damages. Sankey J. relied on *Lacey* v. *Hill, Scrimgeour's Claim* (2), but *Lacey* v. *Hill, Crowley's Claim* (3) is an authority against the learned judge's view. The plaintiff held the share certificates as a security for the defendant's debt to him, and entered into possession of them within the meaning of the sub-section.

Gore-Browne, K.C. (*Neilson* with him), for the plaintiff. Even if the share certificates were a security, the plaintiff was a mortgagee

(1) By 4 & 5 Geo. 5, c. 78 (the Courts (Emergency Powers) Act, 1914), s. 1, sub-s. 1, "From and after the passing of this Act no person shall . . . . (*b*) levy any distress, take, resume, or enter into possession of any property, exercise any right of re-entry, foreclose, realise any security (except by way of sale by a mortgagee in possession), forfeit any deposit, or enforce the lapse of any policy of insurance to which this subsection applies, for the purpose of enforcing the payment or recovery of any sum of money to which this subsection applies, or, in default of the payment or recovery of any such sum of money, except after such application to such Court and such notice as may be provided for by rules or directions under this Act."

(2) (1873) L. R. 8 Ch. 921.

(3) (1874) L. R. 18 Eq. 182.

in possession and came within the exception in s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1914: *Ziman* v. *Komata Reefs Gold Mining Co.* (1) But the true view is that they were not a security within the meaning of the section. Until the principal pays the agent, the latter, in exercising a power of sale, is not realizing a security. [He also cited *Jenkyns* v. *Brown*. (2)]

The Defendant in person in reply. *Ziman* v. *Komata Reefs Gold Mining Co.* (1) is distinguishable; the plaintiff was in possession prior to the passing of the Act.

SWINFEN EADY L.J. This is an appeal by the defendant, Mr. Harry Seymour Foster, from a judgment at the trial by Sankey J. The action relates to Stock Exchange differences.

The plaintiff alleges that on the instructions of the defendant he purchased 100 Canadian Pacific Railway shares at 165½ in March, that they were resold at a loss, and for the amount of that loss the present action is brought. The loss and commission together come to about 142*l*. The defendant, while denying that he was under any liability for that loss, has put in a counter-claim in which he alleges that the resale by the plaintiff of the shares in question was wrongful, and he claims damages for such resale, claiming the difference between the price obtained on the resale, which was, I think, 159, and what would have to be paid in order to repurchase the shares.

The facts are very simple. July 29, 1914, was the last pay day on the Stock Exchange before the commencement of the war. The day after that pay day, and for the new account, the plaintiff, as the broker of the defendant, purchased 100 Canadian Pacific Railway shares at 165½, and in the ordinary course rendered the account showing the purchase-money and the commission. The next day, about midday on July 31, the Stock Exchange was closed, and it remained closed, but on November 18, 1914, there was what may be called a special settlement day appointed by the Committee of the Stock Exchange for closing all bargains that had been opened and had remained unclosed. It was as if the day for which the shares had been bought had been adjourned to November 18. Both parties accept that position, and that seems to be the true

(1) [1915] 2 K. B. 163. (2) (1849) 14 Q. B. 496.

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position. So that on November 18 the position was that the shares must be paid for, and the broker was called upon to pay for the shares to complete his bargain or to be declared a defaulter. That was his position.

Two days before November 18 the plaintiff made out an account of what was then owing in respect of the transaction—that is, the purchase-money, the commission, and the intermediate interest—and he sent it to the defendant with a letter of the same date, November 16, enclosing an account of what was due, namely, 3322*l.*, and pointed out that it must be paid on November 18. The defendant did not pay the amount on that day. The consequence was that the plaintiff had to find the money in order to regularize his position on the Stock Exchange. He was personally liable and had to take up the stock. He took it up and paid for it out of his own money, and apparently sub-pledged the documents of title with his bank.

On November 19 the plaintiff gave to the defendant notice of his intention to resell because the defendant had not completed. On November 23 the resale was carried out, and the price realized was at or about 159. The defendant has contended that he is not liable for the difference on that resale and that the sale was wrong. I should say, first of all, that Canadian Pacific Railway shares are bearer shares passing from hand to hand, and that the purchasers on obtaining the share certificates which pass to bearer become entitled to the dividends payable from time to time in respect of them. The learn d judge put the case in this way: He said that the scrip (meaning thereby the share certificates obtained by the plaintiff) was not a security within the meaning of s. 1, sub-s. 1 (*b*), of the Courts (Emergency Powers) Act, 1914. The defendant's contention was that the broker had a security, and that he was not entitled to realize his security without the sanction of the Court, and that the sale of the shares was an improper sale and invalid as against the defendant because the leave of the Court was not obtained.

Now, Mr. Foster, the defendant, who seems to have appreciated quite clearly every point and who has argued the case in person with great ability, says in the first place that the scrip was a security and that the broker had no right either to enter into possession of it or to sell it, without the leave of the Court. The judge decided, as I

have pointed out, that it was not a security, but, assuming without deciding in favour of the defendant that it is a security,—assuming, for instance, that he is right in that contention and that it is a security within the meaning of the section—the exact terms of the section have to be considered. In the first place the defendant says that the broker had no right to enter into possession. It will be observed that the broker was bound to complete the bargain according to the rules of the Stock Exchange. He was not entering into possession as a mortgagee either adversely to or even with the consent of the mortgagor. It was not in respect of his title of mortgagee that he was so entering. He was broker or agent to buy and personally liable, according to the rules of the Stock Exchange, to complete the transaction, and the character in which he completed the transaction was as such agent for his principal—not entering into possession, but as agent for his principal completing the transaction which the principal should have found the money to complete, and which as between the agent and the principal the agent was not bound to complete without the principal finding the money. But as between the agent and the jobber with whom he dealt in accordance with the rules of the Stock Exchange he was bound. So in my opinion the completion of the transaction by the plaintiff in accordance with the rules of the Stock Exchange was not a transaction that he was prevented from entering into without the leave of the Court—that is to say, it was not such an entering into possession as is contemplated by the sub-section.

There still remains the further point, was he entitled to realize the security? That depends on whether he was at the time he realized a mortgagee in possession. No distinction was drawn between a mortgagee in possession before or after the passing of the Act. There is a prohibition against entering into possession, but when once you have a person validly in possession as mortgagee the Act does not prohibit him selling without the sanction of the Court. In this case the plaintiff was a mortgagee in possession of personal property. If it is asked whether he was in possession or not, what further had he to do in order to become a mortgagee in possession? The answer is "Nothing." He held the share certificates to bearer and they carried with them the right to receive the dividend. He had nothing further to do.

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In my opinion he was mortgagee in possession entitled to realize, or not prohibited by sub-s. (*b*) from realizing, his security. It is a short point and it has been exceedingly well put by the defendant, but on these grounds I am of opinion that the point fails, and that the judgment of the Court below was right, and that the defendant is liable for the difference—143*l.*, or whatever the amount of the judgment is—and that he is not entitled to recover anything as and for a wrongful sale because the plaintiff was entitled to sell at the time he did sell and without the sanction of the Court.

I am of opinion that the appeal fails and should be dismissed.

PHILLIMORE L.J. I am of the same opinion. I assume for the purpose of my decision that there is something to be said against the view of the learned judge that this was not a security. If it was a security, the broker, the plaintiff, would be a security-holder in possession of the security. Such a security-holder, according to the decision of this Court in *Ziman* v. *Komata Reefs Gold Mining Co.* (1), is within the description and intention of this statute a holder. He is a creditor holding a security for his debt, and, as I shall show in a minute, he was in possession of the security. Now it was said that he cannot be in possession of the security because the statute forbids a man entering into possession except by leave of the Court, which he had not obtained, the present case being not like that of *Ziman* v. *Komata Reefs Gold Mining Co.* (1), where the creditor was mortgagee in possession before the Act came into force. The answer requires careful scrutiny. The words of the section "entering into possession" are not used as equivalent to acquiring possession. There is nothing to forbid a buyer acquiring possession from a seller, or a buyer for a principal acquiring possession from the seller for his principal. The words are there, first of all, to prevent a mortgagee from coming into possession, and, secondly, to deal with landlords who may desire to enter into possession under the conditions of re-entry in a lease, and they cover no doubt some other cases; but they are not there to prevent a man from entering into possession with the leave and agreement of his debtor, nor to prevent a man acquiring possession from a third party for his debtor and for himself. From

(1) [1915] 2 K. B. 163.

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the very moment when this man, the broker, actually got the shares, from that moment he was in possession—he acquired possession for himself and for his principal. He never entered into possession against his principal. There are cases where a man can become a mortgagee in possession after the passing of the Act without the leave of the Court—that is, when acting as agent for a principal, by the very terms of his mandate he must take possession, and, having taken possession, is entitled to hold till his lien is displaced. It can be worked out in another manner. It was the duty of the broker here to pay the jobber, and having paid the amount over it was his duty not to go back empty-handed, but it was his duty to his client, the present defendant, to get from the jobber what he had to sell, and he then took possession of that which the jobber had to sell. Taking possession he took it as security. In my opinion this appeal fails.

PICKFORD L.J. I agree, and I do not wish to add anything.

Appeal dismissed.

Solicitors for plaintiff: *Morley, Shirreff & Co.*
Solicitors for defendant: *Timbrell & Deighton.*

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Nov. 8, 25.

[IN THE COURT OF APPEAL.]

HIGGINS *v.* L. HIGGINS & CO.

Employer and Workman—Compensation—Costs—Discretion—Successful Party ordered to pay Costs.

A workman having met with an accident in consequence of which he was ruptured, his employers admitted liability under the Workmen's Compensation Act, 1906, and paid him compensation for thirteen weeks, when they discontinued it on the ground that the incapacity had ceased. The workman applied for arbitration, alleging that the question which had arisen was "as to the amount (or duration) of the compensation payable" to him by his employers under the Act of 1906; and he claimed full compensation upon the ground that he was still partially incapacitated and likely to be so for some months. The parties agreed to refer to a medical referee the questions as to his condition and fitness for employment, and whether his incapacity, if any, was due to the accident. The referee reported that the rupture was caused by the accident, but that the applicant was fit for his former work if he wore a belt. The employers thereupon filed answers in which they denied incapacity and their liability to pay further compensation. The applicant insisted that his incapacity still continued. The matter came before the county court judge, who, at the applicant's request and without objection on the part of the employers, granted to the applicant a declaration of liability but nothing more, and ordered the employers to pay his costs:—

Held, that under Sched. II., par. 7, of the Workmen's Compensation Act, 1906, the costs were in the discretion of the arbitrator just in the same way as costs in the High Court were in the discretion of the judge; but that it was settled that to make this discretion effective there must be materials on which the discretion could be exercised. Here there were no such materials and the employers had been successful throughout, so that there had been no judicial exercise of the judge's discretion, and the order on the employers to pay the costs must be discharged.

APPEAL from an award of the judge of the Manchester County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The following statement of facts is taken substantially from the judgment of Bankes L.J.:—

The workman met with an accident on November 20, 1914, as

a result of which he sustained what is called in his particulars a navel rupture. His employers did not dispute either the accident or the injury, and paid him full compensation for thirteen weeks, when they discontinued it on the ground that the incapacity had ceased. The workman then made an application for arbitration; and in his application he stated that the question which had arisen between himself and his employers was "as to the amount (or duration) of the compensation payable by his employers to himself under the Workmen's Compensation Act, 1906, in respect of the said injury"; and he claimed full compensation, namely, 19*s.* 6*d.* a week, upon the ground that he was then partially incapacitated and likely to be so for some months. After the application was made, and before the answers were put in, a joint application was made by the solicitors for the respective parties for a reference to a medical referee, the questions which had arisen between the workman and his employers being stated in this application to be "as to the condition and fitness for employment of the said applicant and whether or to what extent the incapacity (if any) of the applicant is due to the said accident."

The matter was referred to the medical referee, and he reported that the hernia was caused by the accident, but that the applicant was fit for his former work as an electrician, wearing the abdominal belt which he had been advised to wear. Upon that the respondents filed their answers, in which they denied their liability to pay further compensation under the Act in respect of the alleged injury on the grounds stated in the particulars. The first particular was in these terms: "The respondents admit the accident to the applicant but deny that he is incapacitated as alleged or at all."

Upon these materials the matter came before the learned judge, who, after being told, either by the applicant or on his behalf by his counsel, that in spite of the medical referee's report the applicant could not do his work owing to the shifting of position of the truss when he was engaged on his work, adjourned the matter in order that he might consult the medical referee. Having done this, the judge on a later occasion said that he made it a rule that costs should follow the event unless there was some good ground for holding that they should not do so. A declaration of liability was

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very valuable for the protection of working men, especially as against insurance companies. If he gave a workman anything he always gave him his costs. The respondents only consented to the declaration of liability because they were afraid that an award might otherwise be made against them; and he granted to the applicant a declaration of liability, but nothing more, and ordered the employers to pay his costs.

The employers appealed.

Harold Morris and *Dehn*, for the appellants. The employers have been successful throughout and cannot be ordered to pay the applicant's costs. It is true that a declaration of liability was made in his favour and that that is of importance to him, but he did not ask for it, and it cannot be said to be a decision in his favour or a decision against the appellants, although the judge might no doubt have cured that defect by allowing an amendment. The order was an afterthought. The appellants made no objection to it and could not have done so: *Irons* v. *Davis & Timmins*. (1) The county court judge is stated to have said that if he gave a workman anything he always gave him the costs. That is reported to have been also said in *Derbyshire* v. *John Hetherington & Sons* (2) and to have been a ground for allowing the appeal; but it cannot be supposed that such a remark was really made by the judge, and it is omitted from the report of the case in (1914) W. C. & Ins. Rep. 265.

[LORD COZENS-HARDY M.R. Probably the first mentioned report is inaccurate.]

This point is exactly covered by *Snell* v. *Gross, Sherwood & Heald* (3) and *Jones* v. *Great Central Ry. Co.* (4) Declarations of liability are usually made in such circumstances: *Chapman* v. *Sage & Co.* (5); *Green* v. *Cammell, Laird & Co.* (6)

G. Jordan, for the applicant. The employers did not by their answer consent to a declaration of liability, so the workman had to apply to the Court, and it is right that the appellants should pay his costs: r. 18 of the Workmen's Compensation Rules, 1913—1914. They disputed their liability to pay anything. The county court

(1) [1899] 2 Q. B. 330.
(2) (1914) 7 B. W. C. C. 677.
(3) (1913) 6 B. W. C. C. 242.
(4) (1901) 4 W. C. C. 23.
(5) (1915) 8 B. W. C. C. 559.
(6) (1913) 6 B. W. C. C. 735.

judge has exercised a judicial discretion and the appeal should be dismissed.

Harold Morris in reply.

Cur. adv. vult.

Nov. 25. BANKES L.J. stated the facts and proceeded: The counsel for the respondents thereupon submitted that the judge had no power to award costs to the applicant, and he cited *Derbyshire* v. *John Hetherington & Sons.* (1) I think that the respondents' counsel was mistaken in relying on this decision as constituting an authoritative statement of the law applicable to all cases where an arbitrator refuses the relief claimed and grants a declaration of liability only. Upon the facts of that case and of *Snell* v. *Gross, Sherwood & Heald* (2) as reported the decision merely followed the existing practice. Every case must depend upon its own circumstances. Having regard to the way in which the point was submitted to the county court judge in this case and to his judgment thereon, it may be of use to recall what the established law and practice are. By par. 7 of Sched. II. of the Workmen's Compensation Act, 1906, the costs of and incidental to the arbitration and proceedings connected therewith are in the discretion of the arbitrator, just in the same way as the costs of proceedings in the High Court are in the discretion of the judge where the case is not tried by a jury under Order LXV., r. 1. In both cases, however, the discretion is fettered by a well-accepted rule which was stated by Lord Halsbury in *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (3) in these words: "No doubt, where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied." This rule has been construed in that case and in *Sutcliffe* v. *Smith* (4), *Granville & Co.* v. *Firth* (5), *F. King & Co.* v. *Gillard & Co.* (6), and *Westgate* v.

(1) 7 B. W. C. C. 677.
(2) 6 B. W. C. C. 242.
(3) [1903] 2 K. B. 756, 765.
(4) (1886) 2 Times L. R. 881.
(5) (1903) 72 L. J. (K.B.) 152; 88 L. T. 9; 19 Times L. R. 213.
(6) [1905] 2 Ch. 7.

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Crowe (1) as equivalent to saying that the Court has no right to deprive a successful defendant of his costs unless he has done some wrongful act which concerns the plaintiff or the rights in respect of which the plaintiff is suing.

No general rule therefore can be laid down as to the duty of a judge where, as here, the plaintiff fails in establishing all that he has asked for, or indeed anything that he did ask for in his original application, but is allowed something very different from what he asked for but which is none the less very valuable to him.

Every case must depend upon its own circumstances, but it is sufficient to say that it is very difficult to see how an order can be justified under the rule above laid down unless there is either some ground for saying that the plaintiff did succeed, and the defendant did fail, upon some issue raised upon the proceedings, or that there is some evidence that the plaintiff could not have obtained the declaration of liability without instituting proceedings for arbitration. If evidence was forthcoming upon this last point it would be difficult to say that an arbitrator could not exercise his discretion in favour of the plaintiff on the ground that though in form the application might not have succeeded, yet in substance it really had, and that an amendment, if asked for and granted, would have put the applicant technically in the right.

In the present case the difficulty I feel is that on the materials before us I cannot find any ground upon which the learned judge's decision can be supported. A mere general suspicion of the ways of insurance companies is not enough. The mere fact that the declaration of liability is of value to the plaintiff is not enough.

Upon the facts before the learned judge I can find no evidence that the employers were on any point unsuccessful, or that they had by their conduct in any way brought about the litigation, or done any wrongful act in relation to the plaintiff or his claim for compensation. According to the well-established practice therefore the defendants could not have been deprived of costs had they been asked for, and a fortiori could not have been ordered to pay the plaintiff's costs.

In my opinion the appeal succeeds.

(1) [1908] 1 K. B. 24, 27.

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LORD COZENS-HARDY M.R. I agree.

WARRINGTON L.J. In this case the county court judge on an application by a workman for compensation has made a suspensory award only, but has at the same time ordered the employers to pay the workman's costs.

The employers appeal against this latter part of the award on the ground that they were the successful parties and that there were no grounds on which the judge could properly order them to pay costs and accordingly his discretion was not judicially exercised. They do not say they ought to have been allowed their costs, but only that they ought not to have been ordered to pay those of the applicant. [His Lordship stated the facts, and continued:] The judge at the request of the applicant, the respondents not objecting, made a declaratory award and ordered the respondents to pay the costs. There was no evidence of any suggestion on the part of the applicant that the respondents should submit to a declaratory award until the last moment when it was clear that the application for compensation would fail. There was no reason to suppose that the respondents would have resisted such an award; on the contrary the injury—a rupture—was of such a nature that the making of such awards has become in those cases a common practice. The only issue raised by the claim and answer was the present capacity or incapacity of the applicant, and on this issue he failed. The county court judge seems to have treated the case as if the applicant had succeeded, for he lays considerable stress on the importance, in his view, of a declaratory award. It may be important, but it was not what the applicant asked for. On the issue on which the respondents were brought into Court they were successful and I think were entitled to be so regarded. Then, regarding them as successful, were there any materials for so strong a measure as ordering them to pay the opponent's costs? I can find none whatever. In the absence of such materials the judge's discretion cannot be exercised against a successful litigant: see *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (1)

I deprecate laying down general rules as to how a discretion should

(1) [1903] 2 K. B. 756.

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be exercised. Each case depends in this respect on its own facts, and on those of the present case I have come to the conclusion that the discretion was not and could not be exercised judicially and the direction appealed from cannot stand.

Appeal allowed.

Solicitors: *William Hurd & Son, for James Chapman & Co., Manchester; Boddington, Jordan & Bowden, Manchester.*

H. C. R.

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Nov. 30;
Dec. 3.

HART AND ANOTHER *v.* ROGERS.

[1915 H. 1698.]

Landlord and Tenant—Flat—Landlord retaining Possession of Roof—Liability to repair Roof—Negligence—Absolute Liability.

Landlords let to a tenant a flat on the top floor of a building but retained possession and control of the roof. Water having found its way into the flat through cracks in the roof:—

Held, that the landlords were bound to repair the roof, and that they did not discharge this obligation by showing that they took reasonable care to keep it in repair.

TRIAL of action before Scrutton J. without a jury.

The plaintiffs claimed two quarters' rent together with a sum of 20*l.* for dilapidations and other sums for the use o a telephone and electric light alleged to be payable under an agreement of tenancy of a flat.

The defendant denied liability and in the alternative counter-claimed because during his tenancy the roof of his flat leaked and caused him damage.

The agreement of tenancy was for flat No. 16 on the top floor of Moscow Mansions, Cromwell Road, Kensington, for one year from June 24, 1914, to June 24, 1915, at a rent of 180*l.* payable quarterly and 20*l.* agreed for dilapidations at the end of the tenancy.

Over the defendant's flat was a flat roof of rock asphalt based on concrete with gutters in it, accessible by a ladder from the common landing at the top of the staircase. This roof was not under the

control of the tenant and was under the control of the landlords. It was not included in the tenancy. The roof leaked badly in a heavy snowstorm on January 22 and 23, 1915, and water came through into the hall and bath-room. The leakage did not affect the bedrooms or sitting-room, but rendered the hall unsightly and damp. The defendant did not leave the premises, but continued to live there until the end of February, when a second leakage happened. The first leakage had come through a crack in the asphalt caused by frost and not due to any negligence in supervision by the plaintiffs or their servants. This was repaired by a plumber by cutting out the asphalt and concrete beneath it and replacing them. The plumber kept a watch on the roof, and, as there was another frost on the day on which he finished, he did the work over again to avoid the risk of frost making the new concrete swell. About a month later in another snowstorm another crack appeared. A witness called by the plaintiffs said that the first crack in the asphalt had been mended by filling it with cement, but the learned judge found that this witness was mistaken. The asphalt cracked through the joint action of frost directly acting on it and of frost acting on recently laid concrete, and so indirectly on the asphalt above, and not through any negligence on the part of the plaintiffs. More water came into the hall and bath-room. It did not directly affect the living rooms, but the hall was very damp and unsightly. The defendant then left the flat and remained away until the roof was repaired on March 25, 1915.

Disturnal, K.C., and *Morle*, for the plaintiffs. There is no answer to the claim for rent, for, assuming that there was a breach of duty to repair the roof, that is no defence to an action for rent: *Surplice* v. *Farnsworth*. (1)

As to the counter-claim, the obligation of a landlord who lets a tenement and retains in his own possession something accessory to the enjoyment of the tenement is only to take reasonable care that the retained hereditament does not become a nuisance to the tenant: *Hargroves, Aronson & Co.* v. *Hartopp*. (2) In *Lucy* v. *Bawden* (3) Atkin J. held that the duty of a landlord of small

(1) (1844) 7 Man. & G. 576. (2) [1905] 1 K. B. 472.
(3) [1914] 2 K. B. 318.

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tenements who retained in his possession and control an outside staircase leading to the tenements was only that of an invitor, as described by Willes J. in *Indermaur* v. *Dames* (1), that is, a duty to take reasonable care to protect his tenants from unusual dangers. There is no evidence of want of reasonable care on the part of the plaintiffs in the present case.

Rose Innes, K.C., and *F. Dodd*, for the defendant. As to the counter-claim, the case is covered by *Miller* v. *Hancock* (2), and especially by the judgment of Bowen L.J. (3) The parties to the demise of this flat must have intended by necessary implication, as a basis without which the whole transaction would be futile, that the landlords should maintain the roof, which was essential to the enjoyment of the premises demised. This is a liability founded not upon negligence but upon warranty. It is an example of the principle of *The Moorcock* (4) and *Hamlyn & Co.* v. *Wood & Co.* (5)

The obligation of a landlord varies according as the retained hereditament is merely accessory, as it was in *Hargroves, Aronson & Co.* v. *Hartopp* (6), and where it is absolutely essential, as in the present case, to the reasonable enjoyment of the demised tenement. The defendant is therefore entitled to damages, which may be set off against the rent due, if any.

Cur. adv. vult.

Dec. 3. SCRUTTON J. The question, one of general interest, is, What is the legal obligation imposed on the landlord in respect of the roof? It is clear that ordinarily the lessor of an unfurnished house does not impliedly warrant that it is fit for occupation, and that the lessor of a furnished house or apartments does impliedly warrant that the premises are fit for human occupation at the beginning of the tenancy. What is the position where the landlord retains in his own possession and control something essential to the enjoyment of the premises demised, such as a staircase or a roof? In the case of a roof the Divisional Court in *Hargroves, Aronson & Co.* v. *Hartopp* (6) held that such a landlord was at

(1) (1866) L. R. 1 C. P. 274; affirmed (1867) L. R. 2 C. P. 311.
(2) [1893] 2 Q. B. 177.
(3) [1893] 2 Q. B. 181.
(4) (1889) 14 P. D. 64.
(5) [1891] 2 Q. B. 488.
(6) [1905] 1 K. B. 472.

least under a duty to use reasonable care to keep the roof in repair, following the language of Martin B. in *Carstairs* v. *Taylor*. (1) Lord Alverstone C.J. suggests that in *Miller* v. *Hancock* (2) the Court went further and treated the liability of a landlord who reserved the control of a staircase as an absolute duty to keep the premises in a safe condition at all events. He doubts this, but finds it unnecessary to decide the point.

In *Miller* v. *Hancock* (2) the real question was the liability of the landlord to a visitor of the tenant, but I think, as pointed out in *Huggett* v. *Miers* (3) and in *Hargroves, Aronson & Co.* v. *Hartopp* (4), that the Court approached the matter through the legal relation of landlord and tenant. The defect complained of was a worn condition of steps in a staircase, which must be a condition arising gradually and may or may not be obvious. Lord Esher M.R. says (5): "What, under such circumstances, are the rights of the tenants and the duties of the landlord towards them? Their only mode of access to their tenements was, as I have said, by this staircase. This may be called an easement, but it was, in my opinion, under the circumstances, such an easement as the landlord was bound to keep so as to afford a reasonably safe entrance and exit to the tenants." Kay L.J. (6) speaks of "a duty on the part of the landlord to keep the staircase in a safe condition." Bowen L.J. in a longer passage said (7): "This is not the mere case of a grant of an easement without special circumstances. It appears to me obvious, when one considers what a flat of this kind is, and the only way in which it can be enjoyed, that the parties to the demise of it must have intended by necessary implication, as a basis without which the whole transaction would be futile, that the landlord should maintain the staircase, which is essential to the enjoyment of the premises demised, and should keep it reasonably safe for the use of the tenants, and also of those persons who would necessarily go up and down the stairs in the ordinary course of business with the tenants; because, of course, a landlord must know when he lets a flat that tradesmen and other persons having

(1) (1871) L. R. 6 Ex. 217.
(2) [1893] 2 Q. B. 177.
(3) [1908] 2 K. B. 278.
(4) [1905] 1 K. B. 472.
(5) [1893] 2 Q. B. 179.
(6) Ibid. 182.
(7) Ibid. 181.

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business with the tenant must have access to it. It seems to me that it would render the whole transaction inefficacious and absurd if an implied undertaking were not assumed on the part of the landlord to maintain the staircase so far as might be necessary for the reasonable enjoyment of the demised premises." This passage and the others clearly to my mind use the language of absolute obligation, and Lord Alverstone C.J. in *Hargroves, Aronson & Co.* v. *Hartopp* (1) takes the same view at any rate of the language of Bowen L.J. Atkin J. in *Lucy* v. *Bawden* (2) has come to the conclusion that the decision in *Miller* v. *Hancock* (3) must be limited to the liability for traps as explained in *Indermaur* v. *Dames* (4), and he says the evidence was clearly consistent with the defects being in the nature of a trap. I suppose a worn step may or may not be "a trap" within the meaning of the decisions. The defect which the jury found in *Lucy* v. *Bawden* (5) was the absence of a fence, rail, or baluster, which was a defect that any one could see. There was an allegation that the second step in the outside staircase was defective. The jury negatived this, and Atkin J. says "The case might have had a different result had not the jury negatived the existence of a defect in the repair of the steps"—I suppose if such a defect had been found to be a trap.

I have carefully considered the language of *Miller* v. *Hancock* (3) and have come to the conclusion that, as reported, all the judges imposed an absolute duty to repair on the landlord. I think if the Court, and particularly Bowen L.J., had meant merely to impose a liability for traps on the line of *Indermaur* v. *Dames* (4) they were quite capable of expressing it in clear words and would have done so. If it is to be held that they really meant to limit themselves to imposing either a duty to use reasonable care to repair or a duty to give notice of traps or concealed defects of which the landlord knew and the tenant did not know, it must, in my view, be so held by the Court of Appeal and not by a judge of first instance.

I notice, though it is not authority, that Mr. Foà is of opinion (6) that the decision is perfectly correct and is an authority for holding

(1) [1905] 1 K. B. 472, 478.
(2) [1914] 2 K. B. 318.
(3) [1893] 2 Q. B. 177.
(4) L. R. 2 C. P. 311.
(5) [1914] 2 K. B. 318, 326.
(6) Foà on Landlord and Tenant, 5th ed., p. 143.

that in the letting of flats, where the staircase forms no part of the demise but remains in the control of the landlord, he is responsible to his own tenants for defects of repair.

I proceed to deal with the case on the footing that there is an absolute duty to keep in repair. To avoid difficulties later I will also deal with it on the footing that there was only an implied duty to use reasonable care in repair. There was contradictory evidence as to the facts; on it I come to the following conclusions. [The learned judge stated the facts as above and continued:]

I do not find any negligence in the landlord, his servants or agents, in respect of the second crack, but if the duty is absolute there is a second breach, and in my view the tenant was justified in leaving as he did and remaining away until March 25. The legal result of these facts is as follows: I am unable to see any principle on which these facts give the tenant an answer to the whole claim for rent. In *Surplice* v. *Farnsworth* (1) it was held that the breach of an express covenant to repair, whereby the premises were not fit for the purpose for which they were let, was no defence to a claim for rent, but a matter of cross-action. This seems clearer if the breach only affects the premises for part of the remainder of the demise, as in this case.

The plaintiffs' claim therefore succeeds as to the rent and dilapidations. I see no ground for making the defendant liable for the second quarter's telephone and electric light. There will be judgment for the plaintiffs on the claim for 114*l.* 13*s.* 6*d.*

As to the defendant's counter-claim, I should have given him, if he had moved after the first leakage, the cost of substituted lodgings until the premises were fit again; as he did not move, I allow him something for discomfort and interference with his tenancy till February 25, and from February 25 to March 25, when I think the premises by reason of the two leaks were not reasonably inhabitable. I allow him the cost of substituted rooms. I give him in all 25*l.* damages on the counter-claim with costs.

If the true view of the relation of these landlords and this tenant is that the landlords only contract to use reasonable care to keep the roof in repair, I have found no negligence in this case, and, on that construction, the plaintiffs would have had judgment on the counter-

(1) 7 Man. & G. 576.

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claim with costs. While the state of the law as to the letting of unfurnished premises is in my opinion, and if it is any business of mine to express an opinion, unsatisfactory, the remedy must come from the Legislature and not from the judges.

Judgment for plaintiffs on the claim.
Judgment for defendant on the counter-claim.

Solicitors for plaintiffs: *Boyce & Evans.*
Solicitors for defendant: *Tatham, Oblein & Nash.*

W. H. G.

C. A.
1915
Nov. 23;
Dec. 10.

[IN THE COURT OF APPEAL.]

PEAKE *v.* CARTER.

Interpleader—Practice—Right of Claimant to rely on a Title other than that which Issue directed to try.

The general rule upon the trial of an interpleader issue is that, where a claimant claims under a title which he fails to prove, he is not thereby precluded from relying on the title found.

Flude, Ld. v. *Goldberg* [1915] W. N. 301, post, p. 662, note, distinguished.

APPEAL from the decision of Rowlatt J. on the trial of an interpleader issue without a jury.

The following statement of facts is taken from the written judgment of Swinfen Eady L.J.:—Joseph Carter, having on March 8, 1915, obtained judgment against George Richard Bellamy, issued execution, and the sheriff of Devonshire seized certain goods consisting of mining machinery. These goods were claimed by Sydney Charles Peake, and the ordinary issue was directed to try the question whether the goods seized by the sheriff were at the time of the seizure the property of Sydney Charles Peake as against Joseph Carter. This issue came before Rowlatt J. for trial without a jury. The notice of claim given on behalf of Peake to the sheriff states that the whole of the machinery and tin-dressing plant (being the goods seized in execution at the suit of Carter) are the property of Peake. The judge, after hearing the evidence of the

claimant, acceded to the contention of the execution creditor that the claimant had not established his claim, and without calling on the execution creditor for any evidence gave judgment for him. It is from this judgment that Peake, the claimant, appeals.

It appears from correspondence in evidence that Bellamy negotiated for, and ultimately made an offer to purchase, a lease of china clay for 500*l.* and a royalty of 6*d.* a ton on all clay sold, a lease of the Dimson tin mine and some plant belonging thereto for 2000*l.*, and some tin-dressing plant and machinery at Rumleigh for 350*l.* Bellamy apparently had not of his own the means requisite for carrying his proposal into effect; so he obtained money from Peake, part of which Peake in his turn borrowed from one Spender.

As between Peake and Bellamy the correspondence shows that Peake was to find the money, that the machinery at Rumleigh was to be the joint property of Bellamy and Peake until taken over by a company intended to be formed, which was to purchase it for 700*l.*, and after repaying the 350*l.* provided by Peake for its purchase the balance of 350*l.* profit was to belong as to one half to Bellamy and the other half to Peake. Accordingly an agreement in writing was entered into between George Palmer, the vendor, of the one part and Bellamy and Peake (therein called "the purchasers") of the other part. It is dated July 18, 1914, but was signed by the purchasers on July 23 and by the vendor on July 31. It provides for the purchasers buying the china clay lease, the Dimson mine, and the Rumleigh machinery on the terms I have mentioned. The sum of 50*l.* is acknowledged as a deposit. This sum is apportioned by allotting 5*l.* in respect of the 350*l.* payable for the Rumleigh machinery and 45*l.* between the other two items. The sum of 350*l.*, being the balance of the purchase-money for the Rumleigh machinery, was to be paid on July 14, 1914 (then a past date), and on such payment being made "the purchasers" were to be entitled to the plant and machinery. The payment was made on or about July 14, and the Rumleigh machinery thus became the property of the purchasers, Bellamy and Peake. As between these co-adventurers, the terms on which they acquired it were that out of any proceeds of sale Peake was to be first repaid the 350*l.* which he had provided for the joint adventure, and any surplus proceeds were to belong to the two parties in equal moieties.

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It appears that Peake did find the whole 350*l.* and that, as between him and Bellamy, Peake paid for the whole cost of the machinery. Peake also subsequently found money for dismantling it. It was intended to move it from Rumleigh to Dimson. Palmer was not satisfied with Bellamy's offer to purchase, but had required a more substantial purchaser, and that was how Peake came in.

These are the proper inferences of fact to be drawn from the evidence adduced on behalf of the claimant, subject of course to being displaced by any evidence which Carter might call.

Rowlatt J., without hearing any evidence on behalf of the execution creditor, gave judgment in his favour, holding that the case was governed by *Flude, Ld.* v. *Goldberg.* (1) The claimant appealed.

P. H. Pridham Wippell, for the appellant. There is nothing in the facts to take the case out of the general rule in interpleader that a claimant, who has claimed under a title which he fails to prove, is not thereby precluded from relying on the title found. The case is not covered by *Flude, Ld.* v. *Goldberg* (1), which was decided on its own special facts, from which it appeared that Isaacs, the claimant, was fraudulent in the claim he made, whereas in the present case Peake was absolutely candid and there is no suspicion of fraud. Besides, if the machinery is partnership property, the only right of the execution creditor is to have a receiver appointed under s. 23 of the Partnership Act, 1890. I admit that, as the defendant was not heard by the learned judge, I can only ask for a new trial and not for judgment.

H. St. John Field, for the respondent. *Flude, Ld.* v. *Goldberg* (1) is an authority for the proposition that a man will not be allowed to turn round and contradict that which he has sworn and make a wholly inconsistent claim. If the plaintiff had put forward a claim founded on partnership there would have been no issue. This case, equally with *Flude, Ld.* v. *Goldberg* (1), depends on its own special facts. [He also cited *Holmes* v. *Mentze.* (2)]

P. H. Pridham Wippell in reply.

Cur. adv. vult.

(1) [1915] W. N. 301, post, p. 662, note.

(2) (1835) 4 Dowl. 300; 4 Ad. & E. 127.

Dec. 10. SWINFEN EADY L.J. read the following judgment. [His Lordship, having stated the facts as above set out, proceeded as follows.] Thus the legal position is that this machinery, which are the goods the subject of the interpleader, is the joint property of Bellamy and Peake, and the latter is entitled to be first repaid out of the proceeds of sale the sum of 350*l.*, and any surplus proceeds will belong to Bellamy and Peake equally.

Upon this state of facts Peake has established that the goods are his as against the execution creditor—that is to say, that he has such an interest in the goods that they cannot be taken in execution by the sheriff. By s. 23, sub-s. 1, of the Partnership Act, 1890, it is provided that a writ of execution shall not issue against partnership property, except on a judgment against the firm. Under sub-s. 2 any judgment creditor of a partner may obtain a charging order on that partner's interest in the partnership property. Previous to this enactment the sheriff under a judgment against a partner could seize and sell the interest of the partner in a partnership. Such a seizure was not adverse to the other partners; the sheriff only purported to deal with the share and interest of the partner who was the execution debtor, and it was for this reason that it was held that interpleader proceedings do not lie where the debtor's partner gives notice to the sheriff that the goods are partnership property, and alleges that the debtor has no beneficial interest in them, being indebted to the firm beyond the amount of his share in the effects. The sheriff's duty was to sell the share, though he might not have been able to ascertain the amount of actual interest: *Holmes* v. *Mentze*.(1) If the execution creditor disputed that any particular chattels were in fact partnership property and alleged that they were the sole property of the execution debtor, the ordinary interpleader issue would be directed to try this question: *Holmes* v. *Mentze* (2); *Dibb* v. *Brooke & Sons*. (3)

Under the present law, seeing that the sheriff is no longer entitled to seize in execution the share of a partner in a partnership, if on such a seizure a claim is made that the property is partnership property and this is not disputed, an order should be made at chambers for the sheriff to withdraw. If the execution creditor

(1) 4 Ad. & E. 127. (2) 4 Ad. & E. 133.
(3) [1894] 2 Q. B. 338.

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disputes the partnership with regard to particular chattels and claims that they are the sole property of the execution debtor, the other partner may maintain the claim of the partnership to the chattels upon an interpleader issue, and such a dispute will be the proper subject of an interpleader. If on the other hand the other partner maintains that certain chattels are his own property and do not belong to the partnership, this question does not properly fall to be determined on a sheriff's interpleader, as in neither case would the sheriff be right in seizing them under a judgment against the debtor partner. The dispute should be decided by an inquiry directed under s. 23, sub-s. 2, of the Partnership Act, 1890, to ascertain the particulars of the partnership assets and of the debtor's share and interest therein.

In interpleader proceedings it has not been the practice of the Court to treat the exact form of the issue as material, as " the issue is only a proceeding directed for the purpose of informing the conscience of the Court " : per Parke B., *Carne* v. *Brice*. (1) See also *Gadsden* v. *Barrow* (2), per Alderson B. ; *Edwards* v. *English* (3), per Lord Campbell C.J. ; *Richards* v. *Jenkins* (4), per Wills J. The form used in the present case is the usual and proper form where the goods at the time of seizure are in the judgment debtor's possession, as the question is not whether the goods or money are the property of the claimant or the execution debtor simply. Upon an issue directed in the form in the present case it is not incumbent upon a claimant to prove that the goods are his absolute property. It is sufficient if he show such a title to or interest in the goods that the sheriff ought not to have seized them.

In *Green* v. *Stevens* (5) the claimant, Mary Green, was not the owner of the goods ; they belonged to a man named Williams, but he, not wishing his name to appear, allowed Green to let them as owner to the execution debtor. On a motion for a new trial of the interpleader issue, it was urged that Mary Green, the claimant, not being in actual possession, was bound to show a title to the property in herself. But Pollock C.B. intervening said : " The issue in the present case is, not whether the goods were the property

(1) (1840) 7 M. & W. 183, 187.
(2) (1854) 9 Ex. 514, 517.
(3) (1857) 7 E. & B. 564, 568.
(4) (1886) 17 Q. B. D. 544, 547.
(5) (1857) 2 H. & N. 146, 147.

of Mary Green absolutely, but whether they were hers as against the defendant. My impression is, that this form of issue has been adopted for the express purpose of enabling any person lawfully entitled to possession to sustain his claim." And Bramwell B. intervening said: "Is not the question whether the claimant has such a title as would enable her to maintain an action against the sheriff?" And in giving judgment Bramwell B. said: "In an interpleader issue the plaintiff must make out his title, but he may do so by shewing that he has such a right to the goods that they cannot be taken from him by the execution creditor. In the present case the judge appears to have said that it was not necessary to shew that the goods were absolutely the property of the claimant if they were hers in any sense. I think that this was a just remark, and that if a claimant has any sort of title it must be taken that he has a right to defend it until the contrary is shewn. If it is shewn that he has a lawful title to the possession, that is enough." *Schroeder* v. *Hanrott* (1) is to the same effect. Bovill C.J. said: "The issue is not whether the property abstractedly considered is in the plaintiff, but as to whether the plaintiff has a right to the goods as against the defendant." Again, *Plummer* v. *Price* (2) was a decision of the Court of Appeal, reversing the Common Pleas Division. A claimant in an interpleader issue claimed all the goods seized, and succeeded as to the bulk of them but failed as to the rest; it was held that the claimant had succeeded in substance. Bramwell L.J. said: "I am clearly of opinion that the form of the issue is of no consequence, because it is directed for the purpose of informing the conscience of the Court. The issue is not decided against the claimant if he claims all the goods and it turns out that he is only entitled to some of them, but it is to be taken distributively, and it means, are these goods, or part of them, and, if so, what part, the property of the claimant."

The practice in interpleader is well settled, and I have dwelt upon it because the judge, in deciding against the claimant in the present case, thought himself bound to do so, owing to the decision in *Flude, Ld.* v. *Goldberg.* (3) This view was erroneous. That decision of the Court of Appeal proceeded upon the facts of that particular

(1) (1873) 28 L. T. 704.
(2) (1878) 3 L. T. 657, 658.
(3) [1915] W. N. 301, post, p. 662, note.

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case, and does not disturb the general rule that a claimant, having claimed under a title which he failed to prove, is not thereby precluded from relying on the title found. In *Flude, Ld.* v. *Goldberg* (1) the claimant had filed particulars of his claim under the County Court Order XXVII., r. 5, by which a claimant is required to lodge particulars of the ground of his claim. He stated that " the grounds of my claim are that the said goods and chattels were purchased by me out of my own proper moneys, or upon my own proper credit, from the following firms," whose names he proceeded to state. The partnership was strenuously denied by Isaacs, the claimant, both in his affidavit and in his evidence at the trial, while it was the execution creditor who insisted on the partnership, and that the goods were partnership goods and not that the goods were the sole property of Goldberg. This was the dispute between the parties. No application was made to amend the particulars, and the case proceeded at the trial on the claim as thus appearing on the record. It was under these circumstances that the Court of Appeal decided that the county court judge was right, having regard to the facts of the case, the course of the trial before him, and the conduct of the claimant, in keeping him to the record as it stood and as if limited by his particulars, and in holding that he had failed in his claim. Isaacs persisting in his claim to be sole owner of the goods, the question was left by the judge to the jury, " Were the goods in question the goods of Maurice Isaacs alone ? " and the jury answered " No." This answer disposed of the claim. There was no application for leave to amend, and no application to the judge to put the question to the jury whether the goods in question were the goods of the claimant as against the execution creditor. The case must be regarded as having turned on the particular facts. Another instance of a claimant having been held bound by the particulars of his claim is *Hockey* v. *Evans*. (2)

In the present case the claimant, although alleging that the goods seized are his absolute property, has exhibited a copy of the agreement of July 18, 1914, to which I have before referred, showing the purchase by himself and Bellamy jointly. It may be that in substance all the beneficial interest in the chattels belonged to him, as he found all the money to buy them, and they are said not to be worth

(1) [1915] W. N. 301, post, p. 662, note. (2) (1887) 18 Q. B. D. 390.

or to have realized the amount of his lien. But technically the goods belong to the adventurers jointly.

In my opinion the learned judge was wrong in deciding that he was bound by the case of *Flude, Ld.* v. *Goldberg* (1) to hold that there was no case for the defendant to answer. The claimant has proved a prima facie case that the sheriff was wrong in making the seizure. The judgment must be set aside and a new trial had. Any costs paid to be repaid. The appellant to have the costs of this appeal. The costs of the former trial and of the new trial to abide the event.

PICKFORD L.J. read the following judgment:—In this case certain machinery had been seized by the sheriff of Devonshire to satisfy a judgment obtained by Carter against one Bellamy. Peake claimed the said goods, and an interpleader issue was directed to try the question. The issue was in the usual form, i.e., whether the said goods were at the time of the seizure the property of Peake against Carter.

In support of his claim Peake swore an affidavit in which he claimed the goods as his absolute property. In a later part of the affidavit he sets out the way in which he alleges the goods became his absolute property and exhibits the agreement under which he alleges that he purchased them.

Prima facie, this agreement and the other facts make a case of these goods being bought jointly by Bellamy and Peake for the purpose of a joint adventure and of Peake having provided all the purchase-money. This money was borrowed by Peake, but that is immaterial; he alone was liable to the lender, and as between him and Bellamy the case was the same as if it had been his own money. In taking the accounts of the partnership Bellamy would not be entitled to any share until the lien of Peake upon the partnership assets had been satisfied. I say this is the prima facie case because it is said that it can be disproved by evidence which, owing to the course which the case took at the trial, was not heard.

The issue came on for trial before Rowlatt J., and at the end of the plaintiff's case counsel for the defendant, the execution creditor, submitted that there was no case because the plaintiff had in his

(1) [1915] W. N. 301, post, p. 662, note.

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affidavit claimed the goods as his absolute property and when that case failed in proof could not set up a claim as partner. In support of this contention he relied on the case of *Flude, Ld.* v. *Goldberg.* (1) Rowlatt J. held that he was bound by that case to uphold the defendant's contention and gave judgment accordingly. The learned judge had not the advantage of a full report of the case; if he had had, I think he would not have felt himself bound by it. It turned entirely upon the peculiar circumstances of that particular case. Something turned upon the nature of the proceedings in the county court and the County Court Rules, but the main ground of the decision was that the conduct of the claimant in that case had been such that he ought not to be allowed to set up a case other than that on which he made his claim in the first instance. This is apparent from the remarks of Bankes L.J. in a note of the judgment supplied to us by the reporter. The learned Lord Justice said "It is just one of those cases where a claimant ought to be bound by his particulars," and it is clear that he was speaking with reference to the special facts of the case. The case did not decide that in all cases the claimant must prove the exact interest which he has alleged in his claim. The affidavit is not a pleading, and the issue is not whether the claimant has proved that all he there swore is correct; it is whether the goods are his property as against the execution creditor, and to succeed in that issue it is sufficient for him to prove such an interest as will make it wrongful as against him that the goods should be seized to satisfy the debt due from the execution debtor. An interest as partner is in my opinion such an interest. Since the Partnership Act, 1890, partnership property cannot be seized to satisfy the debt of one partner; all that can be done is to make an order charging the partner's interest in the partnership property with payment of the amount of the judgment debt, and the share can only be ascertained after satisfying all the partnership liens and other claims.

The claimant must state proper materials to enable the judgment creditor to form a correct judgment of the nature of the claim: see per Maule J. in *Webster* v. *Delafield* (2); Halsbury's Laws of England, vol. 17, p. 597, s. 1190; but it is nowhere decided that if he

(1) [1915] W. N. 301; 59 Sol. J. 691; post, p. 662, note.

(2) (1849) 7 C. B. 187, 191.

makes an incorrect statement or draws a wrong inference from those facts his claim must be dismissed. The decision of the Divisional Court in *Flude, Ld.* v. *Goldberg* (1) established the contrary, and was only reversed on the special circumstances of the case. There may be cases in which the claimant may be prohibited from making any alteration in his claim because it is unjust to the execution creditor by reason of his being misled as for other reasons, as in *Flude, Ld.* v. *Goldberg* (2); see also *Hockey* v. *Evans.* (3)

But in this case nothing of the kind exists. All the facts upon which the claimant relies are set out in the affidavit and exhibits, and all that can be said is that the claimant has stated a wrong conclusion from the facts, i.e., that the goods were his absolute property, and that he incorrectly stated that Bellamy had assisted him in the negotiations instead of stating that he was his partner. If the execution creditor had been willing to admit the partnership, some question as to costs might have arisen; but he is not so willing, he wishes to contest the fact of the partnership and to attempt to prove that the goods were the absolute property of Bellamy.

The execution creditor has been in no way misled, and there is no reason why the claimant should not have the advantage, whatever it may be, of the legal result arising from the facts which he has stated.

A further point was taken before us, i.e., that interpleader proceedings cannot be taken and an issue cannot be granted where the claim is in respect of a partnership. This is stated to be the case in some text-books, and the authority upon which it is so stated is *Holmes* v. *Mentze* (4), more fully reported in 4 Ad. & E. 127. This case does not support the proposition. According to the procedure then in force a rule was obtained calling on the claimant and the execution creditor to state their claims. The claimant alleged a partnership; the execution creditor did nothing and did not contest it. The Court discharged the rule on the ground that there was no adverse claim, but on the case coming before it again on another point Patteson J. said that if on the first occasion the partnership had been contested the case would have been within the Interpleader Act and the rule would have been granted. It is therefore no authority that even at that date a claim of partnership

(1) [1915] 2 K. B. 157.
(2) [1915] W. N. 301, post, p. 662, note.
(3) 18 Q. B. D. 390.
(4) 4 Dowl. 300.

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could not have been the subject of interpleader proceedings. But at that time there was power to seize goods for one partner's debt, and the result of proving a partnership was not that the sheriff was obliged to withdraw, but that he could only sell the partner's interest and not the absolute property in the goods. Since the Partnership Act, 1890, the partnership goods cannot be seized for a partner's debt, and therefore to prove an interest as partner is to prove that the seizure was wrongful as against the claimant, and the sheriff must withdraw. A proper way of deciding whether the claim to such an interest is well founded is in my opinion by interpleader proceedings, and I can see no reason in principle or authority why such proceedings do not apply to such a claim.

I think the order of Rowlatt J. must be set aside, and as the execution creditor wishes to deny the existence of the partnership, there must be a new trial.

Appeal allowed. New trial ordered.

Solicitor for claimant: *H. W. Newton, for W. T. Watkins, Tiverton.*

Solicitor for execution creditors: *H. Dobell, for J. P. Dobell, Plymouth.*

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NOTE.

FLUDE, LIMITED *v.* GOLDBERG.

Interpleader—Practice—Right of Claimant to rely on a Title other than that which Issue directed to try.

Goods having been seized in execution of a judgment recovered against one of two partners, the other partner claimed them as his sole property. At the trial of an interpleader issue directed to try the validity of that claim, the jury found that the goods were the property of the partnership:—

Held, that, upon the special facts of the case, the claimant was precluded from relying upon the title found.

APPEAL from the decision of a Divisional Court (Ridley and Lawrence JJ.) upon an appeal from the decision of the county court judge of Leicester upon the trial of an interpleader issue; reported [1915] 2 K. B. 157.

In October, 1911, judgment was recovered in the High Court by Flude, Limited, against H. Goldberg for the price of goods sold and delivered. On April 4, 1914, execution was issued on that judgment, and the sheriff of Nottingham seized certain articles of jewellery upon premises at Nottingham. Those premises were occupied by Reeves & Co. under a tenancy agreement dated February 19, 1914, and made

between the lessor and H. Goldberg and G. Reeves (trading as G. Reeves & Co.). On April 14 a notice signed G. Reeves & Co. was handed to the sheriff stating that the goods seized were not the goods of the defendant Goldberg, and on the same day Maurice Isaacs made an affidavit in which he swore that he was G. Reeves & Co., that the goods seized were his property, and that Goldberg had no interest in them. On the faith of this affidavit the sheriff interpleaded and an order was made that the interpleader proceedings should be transferred to the county court, and that upon payment of 85*l.* to the sheriff by G. Reeves & Co. the sheriff should withdraw from possession. The sum of 85*l.* was duly paid to the sheriff, who thereupon withdrew. On June 9 Isaacs in his own name filed particulars of his claim in which he stated that "the grounds of my claim are that the said goods and chattels were purchased by me out of my own proper moneys, or upon my own proper credit, from the following firms," whose names he proceeded to state. The interpleader issue was tried before the judge with a jury on July 3. It appeared that Maurice Isaacs traded as a "roving auctioneer" in various towns, selling his own goods at mock auctions under the following names: "G. Reeves," "Reeves & Lyons," "G. Reeves & Co.," and "Lambert & Co." The evidence of the claimant was directed to prove that he was the sole owner of the goods, while the cross-examination on behalf of the execution creditors and the evidence of their witnesses were directed to show that Goldberg was a partner of Isaacs and that the goods were partnership property. Although the partnership was strenuously denied by Isaacs, his counsel contended that even if the goods were the property of Isaacs and Goldberg as partners, still Isaacs would have such an interest in them as would support his claim notwithstanding the form of it and the evidence which he had given. No application was made to amend, and the case proceeded on the claim as appearing on the record.

The judge left the following questions to the jury:—1. Were the goods in question the goods of Maurice Isaacs alone? Answer: No. 2. Were they the goods of Goldberg and Isaacs as partners? Answer: Yes. On those findings the county court judge held that Maurice Isaacs had not made out his claim, and that, even if a claim by him as partner would otherwise be good as against the execution creditors, he could not set up a partnership which he had deliberately, both by his affidavit and also at the trial, sworn not to exist. The claimant appealed.

The Divisional Court gave judgment for the claimant, and the execution creditors appealed to the Court of Appeal.

G. Wightman Powers, for the appellant.
H. J. Rowlands, for the respondent.

SWINFEN EADY L.J. This is an appeal from the judgment of a Divisional Court reversing the judgment of the county court judge on an interpleader issue. Judgment for 40*l.* had been recovered against Goldberg in October, 1911, and on April 14 a writ of fi. fa. was issued, under which the sheriff took the goods in a shop at Nottingham, upon

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which Isaacs claimed the goods upon the footing that they were "purchased by me out of my own proper moneys or on my proper credit" from certain named persons. The interpleader was transferred to the county court. The provisions of Order XXVII. of the County Court Rules as to lodging the order with a statement in writing and as to lodging particulars of the goods claimed were duly complied with. In the affidavit in support of the claim the claimant described himself as M. Isaacs, trading as G. Reeves & Co., and said that all the goods were his property and that Goldberg had no interest in them; this is absolutely inconsistent with the view that there was a partnership between Isaacs and Goldberg to which the goods belonged. At the trial, the jury found that the goods seized were not the goods of M. Isaacs, and that they were the goods of Isaacs and Goldberg as partners. The second finding is no part of the issue as limited by the particulars, which was, were the goods Isaacs' goods? It is not to the point to suggest that it is sufficient to say that Isaacs had a lesser interest than he claimed; there are many cases in which a very slight interest in the claimant is sufficient. But that is not this case. The county court judge had to decide the issue as limited by the particulars—whether the claimant had proved the goods to be his property. The facts justified the county court judge in holding the claimant to his particulars. The finding of the jury entirely negatived the title which Isaacs set up to the goods. There is sufficient here to entitle the execution creditors to say that the claimant failed to make out his title. The second finding of the jury ought to be disregarded; and as no new trial has been asked for, the appeal must be allowed.

PHILLIMORE L.J. It is true that many a form of title, if properly claimed, will entitle the claimant to succeed. Whether the proof of a partnership by the claimant was sufficient may be a question. But it is unnecessary to consider that; the claimant made no claim as partner, and he is bound by his claim.

BANKES L.J. I agree. The only point is whether or not the claimant is bound by his particulars of claim as raised in the county court. This is not a technical point, but a point of substance. The execution creditors claimed by proper proceedings to have got Goldberg's interest. But that is not the question; the issue was whether the goods were Isaacs' goods. It was open to the execution creditors to show that the goods were the property of the partnership. Then Isaacs turned round and said that he was entitled to a lesser title than he claimed. It is just one of those cases where a claimant ought to be bound by his particulars. I am of opinion that the decision of the Divisional Court was wrong.

Appeal allowed.

Solicitor for claimant: *A. De Frece, for J. J. Spencer, Nottingham.*
Solicitors for execution creditors: *Vizard, Oldham & Co., for Owston, Dickinson & Co., Leicester.*

W. J. B.

THE KING *v.* JUSTICES OF ESSEX. *Ex parte* BARKING TOWN URBAN DISTRICT COUNCIL.

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Dec. 16, 17.

Local Government—District Council—Knacker's Yard—Licence—Appeal from Grant or Refusal—Knackers Act, 1786 (26 *Geo.* 3, *c.* 71), *s.* 1—*Towns Improvement Clauses Act,* 1847 (10 *&* 11 *Vict. c.* 34), *ss.* 125, 131—*Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *s.* 169—*Public Health Acts Amendment Act,* 1890 (53 *&* 54 *Vict. c.* 59), *ss.* 7, 29—*Local Government Act,* 1894 (56 *&* 57 *Vict. c.* 73), *s.* 27.

A knacker's licence such as was formerly granted by quarter sessions under the Knackers Act, 1786, may now be granted by a district council under s. 29 of the Public Health Acts Amendment Act, 1890.

From a grant or refusal of such a licence by a district council an appeal lies to quarter sessions under s. 7 of the later Act, notwithstanding s. 27, sub-s. 2, of the Local Government Act, 1894.

RULE NISI for a writ of certiorari to the keepers of the peace and justices in and for the county of Essex to remove into the King's Bench Division an order made by them at the general quarter sessions holden on May 1, 1915, upon the appeal of B. A. P., Limited, against the refusal of the Barking Town Urban District Council, the applicants for the rule, to grant or renew a licence to use and occupy as a knacker's yard certain premises situate within the urban district of Barking Town, by which said order it was ordered that the decision of the applicants should be reversed and that unto B. A. P., Limited, hereinafter called the respondents, should be granted a licence as aforesaid, on the ground that the Court of quarter sessions had no jurisdiction.

From the affidavits in support of the rule nisi the following facts appeared:—On January 1, 1915, an application was made to the applicants by the respondents, a limited company, of Carlton House, Regent Street, London, for a licence, in pursuance of the provisions of the Public Health Act, 1875, and the Public Health Acts Amendment Act, 1890, and all other statutory provisions in that behalf, to use and occupy as a knacker's yard certain premises adjacent to River Road, Creekmouth, within the urban district of Barking Town, which premises were formerly in the occupation of the Midland Cattle Products, Limited, who held a knacker's yard licence in respect of them.

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On January 12, 1915, this application was considered by the public health committee of the applicants. On January 26 the applicants refused the licence. The respondents then appealed to the general quarter sessions of the peace for the county of Essex. The appeal was heard on April 7 and May 1, 1915. On the hearing of the appeal objection was taken on behalf of the present applicants that the quarter sessions had no power under the Public Health Acts to grant a licence to use or occupy the premises as a knacker's yard, and that no appeal lay to the quarter sessions from the refusal of the applicants to grant such a licence, and that s. 7 of the Public Health Acts Amendment Act, 1890, did not confer upon the quarter sessions any such appellate jurisdiction or enable that Court to grant any licence to use and occupy the premises as a knacker's yard, inasmuch as the power given to quarter sessions by the Knackers Act, 1786, had by s. 27 of the Local Government Act, 1894, been expressly transferred to the applicants. (1)

This objection was overruled by the quarter sessions. The appeal was heard, and the justices decided that a licence to use and occupy the premises as a knacker's yard should be issued to the present respondents for one year, and such a licence was issued accordingly.

The rule nisi was obtained with a view to quashing this order of the quarter sessions.

For the purpose of showing cause against the rule nisi the respondents by their secretary filed an affidavit stating the following facts:— The applicants, in pursuance of the powers conferred upon them by the statutory provisions in that behalf, granted a licence to the Midland Cattle Products, Limited, for the period of one year from January 1, 1914, to use and occupy as a knacker's yard the premises in question for the purpose of slaughtering or killing any horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other cattle which should not be killed for butcher's meat.

The respondents were a company formed under the auspices of the Royal Society for the Prevention of Cruelty to Animals for the purpose (among others) of endeavouring to bring about a cessation of the exportation of aged and decrepit horses from England by purchasing and dealing with such horses in this country, of promoting humane methods of disposing of worn-out horses and other

(1) See note on p. 673, post.

animals, and of utilizing the carcases for industrial purposes. In August, 1914, they acquired by purchase from the Midland Cattle Products, Limited, the premises and business of that company comprising the premises in question, and went into occupation of the premises. Except during the period from January 1 to May 1, 1915 (the time covered by the refusal of the applicants to grant a licence), they had carried on at the premises the business so acquired. They gave to the inspector of nuisances notice of the change of occupation. On January 1, 1915, they applied to the applicants for a grant of a licence, in pursuance of the provisions of the Public Health Act, 1875, and the Public Health Acts Amendment Act, 1890, and all other statutory provisions in that behalf, to use and occupy as a knacker's yard the premises formerly in the occupation of the Midland Cattle Products, Limited, in respect of which that company held a knacker's yard licence granted by the applicants as aforesaid.

The affidavit went on to state the refusal of the applicants to grant the licence. The Public Health Acts Amendment Act, 1890, had since the year 1890 been in force in the applicants' district.

Macmorran, K.C., and *Naldrett* showed cause. The quarter sessions had jurisdiction to entertain an appeal from the refusal of the applicants to grant this licence, and on that appeal to make the order which the applicants ought to have made—in other words, to grant the licence. By s. 1 of the Knackers Act, 1786, the Court of quarter sessions was empowered to grant licences to persons to use houses for the purpose of slaughtering animals "which shall not be killed for butchers meat." That Act remained in force until 1894. Then by s. 27, sub-s. 2, of the Local Government Act, 1894, the powers of quarter sessions in relation to the licensing of knackers' yards within a county district were transferred to the district council of the district. If the matter had rested there, no doubt there would have been no appeal from the order of a district council. But by the Towns Improvement Clauses Act, 1847, s. 125, power was conferred upon another authority, namely, the commissioners as defined by the Act, to license such slaughter-houses and knackers' yards as they should from time to time think proper for slaughtering cattle. This power was vested in urban authorities by s. 169 of the

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Public Health Act, 1875, which enabled those authorities to provide slaughter-houses, including knackers' yards: see s. 4. From that time until 1890 the quarter sessions under the Knackers Act, 1786, and the local authority by the combined effect of the Towns Improvement Clauses Act, 1847, and the Public Health Act, 1875, had each power to grant or refuse a knacker's licence without appeal. A change was made by the Public Health Acts Amendment Act, 1890, which by s. 2 is to be read as one with the Public Health Acts. By s. 29 licences for slaughter-houses, including knackers' yards, were to be in force for so long as the local authority should think fit to specify in the licences. And by s. 7, sub-s. 1, any person aggrieved by the withholding of any licence which may be granted by a local authority under the Act may appeal to a Court of quarter sessions. The only question remaining is whether a knacker's licence can be granted under the Act of 1890. As that Act is to be read as one with the Public Health Act, 1875, which embodies s. 125 of the Towns Improvement Clauses Act, 1847, the answer is that a knacker's licence may be granted under the Act of 1890. It follows that the quarter sessions had jurisdiction to grant this licence.

Colam, K.C., and *Fortune*, in support of the rule. The grant or refusal of a knacker's licence under the Knackers Act, 1786, by quarter sessions was not subject to any appeal. That jurisdiction was transferred to district councils by s. 27 of the Local Government Act, 1894. Prima facie it was transferred subject to no appeal.

Conceding that a grant or refusal of a licence under the Towns Improvement Clauses Act, 1847, is since the Public Health Acts Amendment Act, 1890, subject to appeal to quarter sessions, such a licence is not merely a knacker's licence. It is a licence to use or occupy a yard "for slaughtering cattle." By s. 131 of the Act of 1847 an inspector may enter any place used for the sale of butcher's meat "or for slaughtering cattle," and if he finds "any cattle" which appears unfit for the food of man he may carry it before a justice, who may order it to be examined, and if "such cattle" is unfit for the food of man the person to whom "such cattle" belongs is liable to a penalty; and the occupier of any building kept for the sale of butcher's meat or "for slaughtering cattle" who obstructs the inspector is liable to a penalty. A licence under this Act includes a licence to slaughter cattle for the food of man. A grant

or refusal of such a licence may be subject to appeal. It is not the sort of licence which is in question in this case.

[AVORY J. By s. 3 of the Act "cattle" includes "horses, asses, mules, sheep, goats, and swine." In the expression "for slaughtering cattle" in s. 131 the word "cattle" must be used in the restricted sense of cattle intended for butcher's meat.]

Secondly, s. 27 of the Local Government Act, 1894, has transferred to district councils all the jurisdiction, appellate as well as original, of quarter sessions.

RIDLEY J. In my opinion the licence in question is a knacker's yard licence and nothing more. The application to the urban district council was for a licence to keep a knacker's yard; the appeal to the quarter sessions prayed that a licence to use and occupy the premises as a knacker's yard should be issued to the appellants, i.e., the present respondents; and the order of quarter sessions was that the Court did thereby license them to use and occupy the premises as a knacker's yard. The licence has nothing to do with a slaughter-house where cattle are slaughtered for the food of man. The question we have to determine is whether an appeal lies to quarter sessions from the refusal of the urban district council to grant a knacker's licence.

It is true that a difficulty is created by the wording of the various enactments relating to this matter. The Knackers Act, 1786, gave original jurisdiction to grant licences to keep or use houses or places "for the purpose of slaughtering or killing any horse, ... ass, ... bull, ... or other cattle which shall not be killed for butchers meat." Such licences were to be granted by the Court of quarter sessions; and until the year 1894 they could be granted by quarter sessions only; but between 1786 and 1894 many Acts had been passed relating to similar matters. First there was the Towns Improvement Clauses Act, 1847, which contains a group of sections beginning with s. 125 and headed "With regard to Slaughter-houses." By s. 125 the commissioners were empowered to license slaughter-houses and knackers' yards "for slaughtering cattle." Several sections follow dealing with slaughter-houses and knackers' yards, and then comes s. 131, empowering officers appointed by the commissioners to enter buildings used "for

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slaughtering cattle." It is argued that this section shows that a licence under the Act of 1847 was more than a knacker's licence and included a licence to slaughter cattle for human food. The section does not mention knackers' yards in so many words, but it is said that it has to do with knackers' yards because a building used "for slaughtering cattle" includes a place for the slaughter of animals not intended for the food of man; since by s. 3 of the Act "cattle" includes horses, asses, and mules as well as sheep, goats, and swine. Therefore, it is said, a licence under this Act includes a licence to slaughter cattle for butcher's meat. That contention, however, cannot prevail, because it is clear that s. 131 is dealing only with the food of man. It empowers officers to "enter into and inspect any building or place kept or used for the sale of butchers meat, or for slaughtering cattle," that is to say, for the use of butcher's meat. It does not mean that an inspector may enter a knacker's yard and fine the owner or occupier if the carcase of an ass is found there. In my view there might be granted under that Act a licence solely for the slaughter of animals not intended for human food, and another licence for the slaughter of cattle for butcher's meat. These provisions of the Towns Improvement Clauses Act, 1847, were incorporated with and became part of the Public Health Act, 1875, by s. 169 of that Act for the purpose of enabling urban authorities to regulate "slaughter-houses" in their districts, a term which by s. 4 includes knackers' yards. The next statute was the Public Health Acts Amendment Act, 1890. By s. 29 licences granted after the adoption of that part of the Act for the use and occupation of places as slaughter-houses, including knackers' yards, are to be in force for such time only, not being less than twelve months, as the urban authority shall think fit to specify in the licences. By s. 7 of the Act any person aggrieved by the withholding of any licence which may be granted by a local authority under the Act may appeal to a Court of quarter sessions. Now the Act of 1890 is to be read as one with the Public Health Act, 1875, and must be construed as if that Act with the appropriate sections of the Act of 1847 were written into it. If the licence in this case is a knacker's licence and one which could be granted under the Act of 1847, it may be granted now under the Act of 1890. The difficulty in this case then seems to disappear. The power to grant knackers'

licences under the Act of 1847 was transferred to the urban authority, and from the refusal of the urban authority to grant a licence an appeal lies to quarter sessions. But it is said this is not so, and that whatever appellate jurisdiction was vested in quarter sessions in 1890 was taken away in 1894, because by s. 27, sub-s. 2, of the Local Government Act, 1894, the powers of quarter sessions in relation to the licensing of knackers' yards within a county district were transferred to the district council of the district. In my opinion that is a misreading of s. 27, sub-s. 2, of the Local Government Act, 1894. The real effect of that enactment was this: The original jurisdiction of quarter sessions to grant licences under the Act of 1786 was still outstanding. This jurisdiction had to be dealt with. It could not conveniently be left with the body which had to exercise an appellate jurisdiction in the case of grants by other authorities. Therefore this original jurisdiction was transferred from quarter sessions to the district councils. But that transfer did not in any way affect the appellate jurisdiction under s. 7 of the Public Health Acts Amendment Act, 1890, which the Court of quarter sessions has exercised in this case. For these reasons I am of opinion that there was no excess of jurisdiction by that Court and that the rule must be discharged.

AVORY J. I agree.

LUSH J. I agree. Notwithstanding some doubt, I have come to the conclusion that the commissioners had power under the Towns Improvement Clauses Act, 1847, to license not only slaughter-houses for animals intended for the food of man, but also knackers' yards for animals not intended for the food of man. After the passing of the Knackers Act, 1786, the phrase "knacker's yard" was used to mean a yard intended for the slaughter of animals not used or intended for human food. By s. 12 of the Slaughter-houses, &c. (Metropolis), Act, 1874 (37 & 38 Vict. c. 67), "knacker" is defined as "a person whose business it is to slaughter any horse, ass, or mule, or any cattle, sheep, goat, or swine which is not killed for the purpose of its flesh being used as butchers meat." By s. 125 of the Towns Improvement Clauses Act, 1847, the commissioners had power to license not only such slaughter-houses, but also such knackers' yards as they should from time to time think proper "for

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slaughtering cattle within the limits of the special Act." "Cattle" as explained by s. 3 of the Act "includes horses, asses, mules, sheep, goats, and swine," some of which are certainly not used for the food of man. Therefore s. 125 is not confined to places for the preparation of butcher's meat, but includes knackers' yards for the slaughter of beasts not intended for human food. The difficulty I felt during the argument is caused by s. 131, in which the same words "for slaughtering cattle" are used, and where they clearly mean "for slaughtering cattle for human food," since otherwise the section would have this absurd effect, that a man who had a licence to use premises as a knacker's yard could be fined 10*l.* if the carcase of a donkey were found there. To avoid this consequence the expression "for the slaughter of cattle" in s. 131 must be read in a different sense from that which it has in s. 125.

Then, if the Towns Improvement Clauses Act, 1847, gave power to license knackers' yards, that power was incorporated in the Public Health Act, 1875, and so in the Public Health Acts Amendment Act, 1890. But s. 7 of the last-named Act has provided for an appeal by any person aggrieved by the withholding of a licence which may be granted by a local authority under the Act. If the three Acts are to be read as one the licence was granted under the Act of 1890. In that case there is an express right of appeal to quarter sessions, and if a knacker's licence could be granted under the Towns Improvement Clauses Act, 1847, as I think it could, then quarter sessions in this case had jurisdiction to entertain the appeal and make the order which the district council ought to have made and grant the licence to use the premises as a knacker's yard. This view gives countenance to the anomaly that between the years 1847 and 1894 there were two independent authorities each invested with the power to grant knackers' licences. Notwithstanding this, however, I think that Mr. Macmorran's argument must prevail, and that the Court of quarter sessions had jurisdiction on appeal to grant the licence. The rule must therefore be discharged.

Rule discharged.

Solicitor for applicant: *D. H. Wiseman.*

Solicitors for respondents: *Lee, Ockerby & Everington, for R. Vaughan Gower, Tunbridge Wells.*

NOTE.—Knackers Act, 1786 (26 Geo. 3, c. 71) :—

Sect. 1 : "No person or persons shall keep or use any house or place, for the purpose of slaughtering or killing any horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other cattle, which shall not be killed for butchers meat, without first taking out a licence for that purpose, at the general quarter sessions held for the county . . . . wherein such slaughtering house or place shall be situate ; and the justices of the peace, at their general quarter sessions assembled, are hereby authorized and empowered to grant such licences as aforesaid, upon a certificate, under the hands and seals of the minister and churchwardens, or overseers, or of the minister and two or more substantial householders of the parish wherein the person or persons applying for such licence shall dwell, that such person or persons is or are fit and proper to be trusted with the management and carrying on such business as aforesaid . . . ."

Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34) :—

"And with respect to slaughter-houses, be it enacted as follows :—"

Sect. 125 : "The commissioners may license such slaughter-houses and knackers yards as they from time to time think proper for slaughtering cattle within the limits of the special Act."

Sect. 126 : "No place shall be used or occupied as a slaughter-house or knackers yard within the said limits which was not in such use and occupation at the time of the passing of the special Act, and has so continued ever since, unless and until a licence for the erection thereof, or for the use and occupation thereof as a slaughter-house or knacker's yard, have been obtained from the commissioners ; and every person who, without having first obtained such licence as aforesaid uses as a slaughter-house or knacker's yard any place within the said limits not used as such at the passing of the special Act, and so continued to be used ever since, shall for each offence be liable to a penalty . . . ."

Sect. 131 : "The inspector of nuisances, the officer of health, or any other officer appointed by the commissioners for that purpose, may at all reasonable times . . . . enter into and inspect any building or place whatsoever within the said limits kept or used for the sale of butchers meat, or for slaughtering cattle, and examine whether any cattle, or the carcase of any such cattle, is deposited there ; and in case such officer shall find any cattle, or the carcase or part of the carcase of any beast, which appears unfit for the food of man, he may seize and carry the same before a justice, and such justice shall forthwith order the same to be further inspected and examined by competent persons ; and in case, upon such inspection and examination, such cattle, carcase, or part of a carcase be found to be unfit for the food of man, such justice shall order the same to be immediately destroyed or otherwise disposed of . . . . and such justice may adjudge the person to whom such cattle," &c., "belongs, or in whose custody the same is found, to pay a penalty not exceeding 10*l.* for every such animal or carcase or part of a carcase so found ; and the owner or occupier of any building or place kept or used for the sale of butchers meat, or for slaughtering cattle . . . .

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who obstructs or hinders such inspector or other officer from entering into and inspecting the same, and examining, seizing, or carrying away any such animal or carcase or part of a carcase so appearing to be unfit for the food of man, shall be liable to a penalty . . . . "

Public Health Act, 1875 (38 & 39 Vict. c. 55) :—

Sect. 169 : " Any urban authority may, if they think fit, provide slaughter-houses, and they shall make byelaws with respect to the management and charges for the use of any slaughter-houses so provided.

" For the purpose of enabling any urban authority to regulate slaughter-houses within their district the provisions of the Towns Improvement Clauses Act, 1847, with respect to slaughter-houses shall be incorporated with this Act."

Sect. 4 : " In this Act, if not inconsistent with the context . . . . ' slaughter-house ' includes the buildings and places commonly called slaughter-houses and knackers yards, and any building or place used for slaughtering cattle horses or animals of any description for sale."

Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59) :—

Sect. 2 : " (1.) This Act shall be construed as one with the Public Health Acts."

Sect. 29 : " Licences granted after the adoption of this part of this Act for the use and occupation of places as slaughter-houses shall be in force for such time or times only, not being less than twelve months, as the urban authority shall think fit to specify in such licences."

Sect. 7 : " (1.) Any person aggrieved—

" (*a*) by any order, judgment, determination, or requirement of a local authority under this Act ;

" (*b*) by the withholding of any order, certificate, licence, consent, or approval, which may be made, granted, or given by a local authority under this Act ; . . . .

may appeal in manner provided by the Summary Jurisdiction Acts to a Court of quarter sessions . . . ."

Local Government Act, 1894 (56 & 57 Vict. c. 73) :—

Sect. 27 : " (2.) As from the appointed day, the powers, duties, and liabilities of quarter sessions in relation to the licensing of knackers' yards within a county district shall be transferred to the district council of the district."

W. H. G.

SCOTTISH NAVIGATION COMPANY, LIMITED *v.* W. A. SOUTER & CO.

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Dec. 13, 14, 21.

[1914 S. 3254.]

Ship—Charterparty—Hire—Restraint of Princes—Frustration of Adventure—Right to cancel when Ship not free of Cargo—Form of Cancellation Notice.

By a charterparty, headed "Time Charter," the plaintiffs let their steamship *Dunolly* to the defendants for one Baltic round at a certain rate of hire per month. In the event of Great Britain or other European Power being involved in war affecting the working of the steamer at the commencement or during the currency of the charterparty the defendants had the option of cancelling. The act of enemies and restraints of princes were mutually excepted. The *Dunolly* came on hire on July 4, 1914, and the first month's hire was paid; she was sub-let by the defendants, and she sailed to the Baltic and was loading a cargo for the sub-charterers at a port in Finland when war broke out between Russia and Germany on August 1 and between Great Britain and Germany on August 4. On August 5, by which date the *Dunolly* was partly loaded and the master had given bills of lading which were held by the sub-charterers, the defendants purported to cancel by a telegram in the following terms: "We hereby notify you that owing to Great Britain being at war affecting the working of *Dunolly*, we exercise our option and now cancel this steamer's charter with the proviso that we reserve our claim to proportion of freight to cover hire and charges already paid, and also reserving our right to claim any other losses or damages."

After August 1, in consequence of orders of the Russian authorities, it was impossible for the *Dunolly* to leave the Baltic, and she was still there on November 4, 1914. In an action for the chartered hire to November 4, 1914:—

Held, that the defendants were liable, inasmuch as (1.) the doctrine of frustration of the adventure set up by them had no application, as that doctrine applies only where the object which both parties had in view is frustrated, and in this case the plaintiffs' object, which was to receive the chartered hire, had not been frustrated by the restraint of princes; and (2.) they were not entitled to rely on their notice of cancellation, because neither on the date when it was given nor within a reasonable time thereafter

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were they in a position to hand over the vessel free of cargo and free of commitments.

Semble that the cancellation notice was invalid in view of the reservations contained therein.

ACTION tried by Sankey J.

The following statement of facts is taken in substance from the judgment :—

The plaintiffs claimed 3412*l.* 10*s.* for hire alleged to be due to them for the use of their steamship *Dunolly* to November 4, 1914, when the writ was issued.

The defendants alleged that no hire was due because of the frustration of their adventure, or alternatively because they gave notice, as they were entitled to do, to cancel the charterparty. They further said that in any event no hire was due after August 31, when the owners removed their crew from the vessel.

The facts were as follows : By a charterparty, headed " Time Charter," dated June 30, 1914, the plaintiffs let and the defendants hired the *Dunolly* for one Baltic round at the rate of 975*l.* per calendar month, payable half-monthly in advance. The *Dunolly* came on hire at 6 A.M. on July 4, 1914, and the defendants duly paid the hire for the first month. The defendants in their turn let the ship to Messrs. Horsley by a sub-charter dated July 2, 1914.

The charterparty of June 30, 1914, contained the following provisions : (1.) In the event of Great Britain or other European Power being involved in war affecting the working of the steamer at the commencement or during the currency of the charterparty the defendants had the option of cancelling it. (2.) The act of enemies and restraints of princes were mutually excepted. (3.) In the event of loss of time from deficiency of men payment of hire was to cease.

The vessel duly sailed to the Baltic, there to load timber for the sub-charterers, and upon July 27 she began taking in cargo at Friedricksham. On July 30 she arrived at Klamira to take in further cargo, and while there the half-monthly instalment of hire became due. On August 5 she arrived at Hurppu, where she finished loading upon August 8.

Meanwhile war broke out between Russia and Germany on August 1, and between Great Britain and Germany upon the 4th, and

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upon the 5th the defendants purported to cancel the charterparty by the following telegram of that date addressed to the plaintiffs: "We hereby notify you that owing to Great Britain being at war affecting the working of *Dunolly*, we exercise our option and now cancel this steamer's charter with the proviso that we reserve our claim to proportion of freight to cover hire and charges already paid, and also reserving our right to claim any other losses or damages."

As to the exact position of affairs at the various ports at which the *Dunolly* had been loading timber considerable evidence, both oral and documentary, was adduced, and the judge was satisfied that after August 1 it was impossible for the *Dunolly* to leave the Baltic for England. The Russian authorities upon that date proclaimed martial law in the Wiborg district, where Friedricksham and Hurppu are situated, and issued an order forbidding all vessels within the district from leaving the same. Permission was later given, but only to neutral vessels, to go via Baltischport at their own risk. Upon August 10 the Russian authorities prohibited the export of wood goods, and the *Dunolly* in fact got no permission to carry such goods. No insurance of any sort could be obtained which would cover the ship on leaving Hurppu, and there were a number of other English vessels similarly caught in the Baltic, some of which found their way, as did the *Dunolly* at a later period, to Petrograd.

When the defendants gave their cancellation notice on August 5 the vessel had been partly loaded and the master had given bills of lading which were held by the sub-charterers. She was therefore neither free from cargo or commitments. On August 26 the sub-charterers telegraphed to Friedricksham to ascertain the cost of discharging the cargo, and eventually they received the reply, dated August 29, that it would be 6500 marks. On August 31 the owners brought the crew home with the exception of the master and the engineer. Mr. Wilson, one of the firm of sub-charterers, stated that this affected the possibility of the discharge of the ship. The judge said he did not agree with this statement; the master and the engineer remained behind, and he accepted the evidence of the former that he could have obtained shore labour, which was cheap and plentiful, to discharge.

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The defendants on September 7 wrote making certain offers both with regard to the cargo and the bills of lading, but they were refused by the plaintiffs on the next day. In the judge's opinion the defendants never took any proper or definite steps as to the cargo, and never came forward with any proper or definite proposals as to the bills of lading. They thought they were entitled to rely on their cancellation notice of August 5 and washed their hands of the matter. The judge was confirmed in this opinion by their solicitors' letter of September 21, where they said "Our clients' contention is and has always been that in the events which have happened the time charter came to an end on August 4 and that it has since been your duty to deal with the cargo on account of whom it might concern."

Leck, K.C., and *Raeburn*, for the plaintiffs. The defendants are liable for the hire claimed, for although they purported to cancel the charterparty they had put it out of their power to cancel by the fact that they or their sub-charterers continued to use the vessel. As long as charterers have the use of the chartered vessel their obligation to pay hire continues. This obligation is unaffected by the fact that the ship may have been damaged so that she is laid up for repair—see *Hough & Co.* v. *Head* (1)—or has otherwise been detained at a port: see *Moorsom* v. *Greaves* (2); unless, indeed, the charterer has protected himself by a loss of time clause. In *Steel, Young & Co.* v. *Grand Canary Coaling Co.* (3) Lord Macnaghten pointed out that difficulties must arise if a charter were to be annulled after cargo had been shipped on board, and that it was therefore reasonable to stipulate that a provision in the charterparty there in question annulling a charter should not apply when once cargo had been shipped. [They also cited *Hadley* v. *Clarke* (4), *Sheffield Nickel and Silver Plating Co.* v. *Unwin* (5), *Langford (Owners of S.S.)* v. *Canadian Forwarding and Export Co.* (6), and *Brown* v. *Turner, Brightman & Co.* (7)]

Secondly, the purported cancellation of the charterparty was

(1) (1885) 54 L. J. (Q.B.) 294.
(2) (1811) 2 Camp. 627.
(3) (1904) 9 Com. Cas. 275, 278.
(4) (1799) 8 T. R. 259.
(5) (1877) 2 Q. B. D. 214, 223.
(6) (1907) 96 L. T. 559.
(7) [1912] A. C. 12.

ineffective. To be effective a notice must be unconditional, and the defendants' notice contained express reservations.

Thirdly, on the facts the cesser of hire clause providing that in the event of loss of time from deficiency of men payment of hire should cease did not apply. In applying that clause regard must be had to the particular employment of the vessel. A vessel may have a deficiency of men for the purpose of navigation but may have enough men for loading and discharging in a port: *Hogarth* v. *Miller, Brother & Co.* (1) This vessel had enough men while she was lying in port. Further, the deficiency of men must be the proximate cause of the detention in order that the clause shall apply, and that was not the case here. [They also cited *The Santona* (2) and *Aktieselskabet "Lina"* v. *Turnbull & Co.* (3)]

Maurice Hill, K.C., and *R. A. Wright*, for the defendants. This charterparty, although on a time charter form, is in reality a voyage charter, the contract being for one Baltic round; and, quite apart from any of its clauses, the adventure was put an end to on August 1. There was a complete frustration of the adventure within the decisions in *Jackson* v. *Union Marine Insurance Co.* (4) and *Embiricos* v. *Sydney Reid & Co.* (5) The cases relied upon on behalf of the plaintiffs were all time charters, where different considerations apply.

Further, the charterparty was properly cancelled. It is said for the plaintiffs that charterers cannot cancel if they have cargo on board and cannot, therefore, put the owners in their original position; but a cancelling clause always assumes that the parties cannot be put back in their original position, which is that the ship has not sailed under the charter at all. *Steel, Young & Co.* v. *Grand Canary Coaling Co.* (6) is not an authority in favour of the plaintiffs. Lord Macnaghten in the passage referred to was merely commenting upon a particular clause in the charterparty there in question. Even assuming that it was the defendants' duty to remove the cargo, the non-performance of that duty did not render the cancellation invalid, but might possibly make the defendants liable in damages. As to the form of the cancellation notice, it was not

(1) [1891] A. C. 48.
(2) (1907) 152 Fed. Rep. 516.
(3) 1907 S. C. 507.
(4) (1874) L. R. 10 C. P. 125.
(5) [1914] 3 K. B. 45.
(6) 9 Com. Cas. 275.

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rendered invalid because the charterers claimed something which they could not maintain.

Finally, the circumstances brought the case within the cesser of hire clause. After the crew were removed on August 31 there was a deficiency of men.

Leck, K.C., in reply. The charter is not for a voyage, but is a time charter. There was no frustration of the adventure within the decision in *Jackson* v. *Union Marine Insurance Co.* (1), for, as Brett J. pointed out in *Hudson* v. *Hill* (2), it is where the delay is so long as to frustrate the mercantile adventure as at first contemplated by both parties that the original contract is determined and cannot be enforced; he further pointed out that the adventure on the part of the owners was to earn the hire of the ship, and that the mere failure of the vessel to arrive in time to carry out the charterers' intention did not frustrate her owners' purpose in entering upon the contract of affreightment. Those observations apply precisely to the present case. [He also cited *Braemount S.S. Co.* v. *Weir & Co.* (3) and *Beal* v. *Horlock.* (4)]

Cur. adv. vult.

Dec. 21. SANKEY J. read his judgment, which, after stating the facts already set out, continued: Under these circumstances the defendants rely first upon the well-known cases of *Jackson* v. *Union Marine Insurance Co.* (1) and *Embiricos* v. *Sydney Reid & Co.* (5), and contend that they were entitled to throw up the charterparty upon the ground of the frustration of the adventure. They say that the charterparty, although headed "Time Charter," was really a voyage charter for a Baltic round, and after August 1 the adventure became impossible and both parties were discharged.

In my view this contention is not correct. I think that the charter is a time charter. It is expressed to be such, the hire is calculated monthly, and there is a wide area in which the vessel may trade. The real meaning of the contract between the parties is that the plaintiffs agreed to allow the defendants to have the use of the vessel subject to restraint of princes. This they have done and have

(1) L. R. 10 C. P. 125.
(2) (1874) 43 L. J. (C.P.) 273, 279.
(3) (1910) 15 Com. Cas. 101.
(4) [1915] 3 K. B. 627.
(5) [1914] 3 K. B. 45.

always been willing to do. The doctrine of frustration of adventure appears to me to apply only where the object which both parties have in view is frustrated. I doubt whether the doctrine is ever applicable to the general hiring of a vessel under a time charterparty, where the owner's only object is to earn freight. I think that it is confined to cases where it can be inferred from the charter itself that it is a contract for a definite voyage, or a definite object contemplated at first by both parties: *Jackson* v. *Union Marine Insurance Co.* (1); *Hudson* v. *Hill.* (2) In the present case the object of the plaintiffs has not been frustrated, the restraint of princes has not prevented the payment of hire by the defendants, nor have any of the events occurred which under the charterparty excuse them from that obligation. I therefore decide against the defendants' first contention and proceed to the consideration of the cancellation points.

The first one which falls for decision is, when and under what circumstances are charterers entitled to give notice of cancellation? In my view charterers are only entitled to give such a notice when they are ready and willing to hand over the vessel free of cargo and free of commitments or when they will be ready and are willing to do so in a reasonable time. [His Lordship stated the facts upon this point as already set out, and continued:] Under these circumstances I hold that the defendants were not in a position to, and did not, hand the vessel over free of cargo and free of commitments in a reasonable time and are therefore not entitled to rely upon their cancellation notice. The hire ran on because the events which happened were not such as entitled the defendants to rely upon the hire cesser clause.

As to the validity of the cancellation notice, I consider on the whole the notice is not a good one. I am disposed to think that such a notice should make it clear that the vessel is free of cargo and free of commitments, or will be so in a reasonable time. The present notice does neither, but rather seems to make certain reservations. In the view I take, however, it is not necessary to decide this question.

Finally, the defendants contend that hire does not run after August 31, the day on which the crew were sent home, because

(1) L. R. 10 C. P. 125. (2) 43 L. J. (C.P.) 273.

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there was then a deficiency of men within the meaning of the hire cesser clause. In my opinion this is unsound. The point could not have been taken if the plaintiffs had kept all their men upon the ship with practically nothing to do. I cannot think that the rights of the parties depend upon the plaintiffs having to take such an unreasonable course, but beyond that, as I have above found, the master had at his disposal all the labour necessary for the defendants' use for the discharge of the ship.

The result is that the defences fail and the plaintiffs are entitled to my judgment.

Judgment for plaintiffs.

Solicitors for plaintiffs : *Lowless & Co.*

Solicitors for defendants : *Maples, Teesdale & Co., for Bramwell, Bell & Clayton, Newcastle-upon-Tyne.*

J. S. H.

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Jan. 13.

THE KING *v.* SHEFFIELD JUSTICES. *Ex parte* MORRISON.

Licensing Acts—Compensation—Reference of Claim to Inland Revenue Commissioners—No Agreement as to Compensation submitted to Compensation Authority—Licensing Rules, 1910, *r.* 31—*Licensing (Consolidation) Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 20.

Where the renewal of a licence has been refused by the compensation authority subject to the payment of compensation, no obligation is imposed by the Licensing (Consolidation) Act, 1910, or by the Licensing Rules, 1910, upon the persons entitled to compensation to submit any agreement that may have been arrived at as to the amount to the compensation authority for their approval; and, therefore, where no agreement is submitted the matter must be referred to the Inland Revenue Commissioners under r. 31 of the Licensing Rules, 1910.

RULE NISI directed to the compensation authority for the city of Sheffield, calling upon them to show cause why a mandamus should not issue requiring them to send to the Inland Revenue Commissioners a notice pursuant to r. 31 of the Licensing Rules, 1910, in order that the Commissioners might fix the amount of

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compensation payable in respect of the non-renewal of the licence of the Economical Hotel, Sheffield.

The licensing justices having on February 13, 1915, referred the question of the renewal of the hotel licence to the compensation authority, that authority on April 21, 1915, refused the renewal subject to the payment of compensation under s. 20 of the Licensing (Consolidation) Act, 1910. (1) The applicant for the rule, who was

(1) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 20, sub-s. 1: "Where the compensation authority refuse the renewal of an old on-licence, a sum equal to the difference between the value of the licensed premises . . . . and the value which those premises would bear if they were not licensed premises, shall be paid as compensation to the persons interested in the licensed premises."

Sub-s. 2: "The amount to be so paid shall, if an amount is agreed upon by the persons appearing to the compensation authority to be interested in the licensed premises and is approved by that authority, be that amount, and, in default of such agreement and approval, shall be determined by the Commissioners of Inland Revenue, ... and in any event the amount shall be divided amongst the persons interested in the licensed premises (including the holder of the licence) in such shares as may be determined by the compensation authority . . . ."

Licensing Rules, 1910, r. 27: "The compensation authority shall, after the time limited by these Rules for the sending in of claims has elapsed, hold a supplemental meeting for the purpose of considering whether their approval should be given to any sum agreed upon by the persons entitled to compensation and submitted to them as the money to be paid as compensation (in these Rules referred to as 'compensation money'), and of settling the shares in that compensation money; and at that meeting shall give any person entitled to compensation an opportunity of being heard with respect to those matters . . . ."

Rule 29: "Where the persons entitled to compensation agree upon a sum to be submitted to the compensation authority as the amount of compensation money, a written statement to that effect containing the sum agreed upon, signed by or on behalf of all those persons, must be lodged with the compensation authority at the meeting or previously thereto."

Rule 30: "(1.) At the meeting the compensation authority shall, if an agreement as to the sum to be paid as compensation money is submitted to them for their approval, consider whether their approval shall be given to that sum, and, if their approval is so given, shall proceed to settle the shares of the persons entitled to compensation in that sum."

Rule 31: "If the amount of compensation money remains to be determined otherwise than by means of an agreement approved

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the licensee of the hotel, desired to go direct to the Inland Revenue Commissioners to have the amount of compensation fixed, and consequently did not submit any agreement to the compensation authority under the Licensing Rules. The compensation authority took the view that an agreement as to the amount of compensation must be submitted to them, and they adjourned their meeting from time to time to enable this to be done, and as they declined to send a notice in pursuance of r. 31 to the Inland Revenue Commissioners, this rule was obtained.

It was stated at the Bar that in fact no agreement had been arrived at, and that the applicant and other licensees in the same position, who had obtained similar rules, had intentionally not arrived at agreements with the view of having the point decided whether the compensation authority were entitled to refuse to send a notice to the Inland Revenue Commissioners if an agreement was not submitted to them.

Tindal Atkinson, K.C. (*Waddy* with him), for the compensation authority, showed cause. The scheme of the Licensing (Consolidation) Act, 1910, and the Licensing Rules is that the compensation authority, in view of their local knowledge, should have an opportunity of expressing approval or disapproval of the agreement come to by those claiming compensation. If the applicant is right, the parties interested can in every case insist upon the matter being referred to the Inland Revenue Commissioners. Obviously that was not the intention of the Legislature. When an agreement has been come to—and in this case the compensation authority were under the impression that an agreement had been arrived at—it should be submitted to the compensation authority before being referred under r. 31 to the Inland Revenue Commissioners.

G. C. Whiteley, in support of the rule, was not called upon.

LORD READING C.J., after stating the nature of the rule, continued as follows: The question for our determination is whether

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by the compensation authority, the compensation authority shall send a notice of the fact to the Commissioners of Inland Revenue, Somerset House, London, W.C., accompanied by a statement of the names and addresses of the persons entitled to compensation."

or not there is in the Licensing (Consolidation) Act, 1910, and the Licensing Rules, 1910, any obligation upon the claimant for compensation either to endeavour to arrive at an agreement, or, if an agreement has been arrived at, whether he is bound to submit it to the compensation authority for their approval before the claim can be transmitted to the Inland Revenue Commissioners for the purpose of the amount of compensation money being fixed by them. In this case the claimant says that if he does not choose to submit an agreement to the compensation authority they have no jurisdiction to deal with the matter in any way, and therefore they must, in pursuance of r. 31, forward the prescribed notice to the Inland Revenue Commissioners, who, in the absence of an agreement approved by the compensation authority, alone can determine the amount of compensation. It is quite clear that under the Act there is no power in the compensation authority to fix the amount of compensation; they can only fix the proportions payable to the various persons interested when the amount is fixed. In the present case the claimant and certain others in the same position determined that they would go direct to the Inland Revenue Commissioners, and consequently they did not submit any agreement to the compensation authority. The compensation authority apparently took the view that an agreement had been arrived at and that the claimant was bound to submit it for their approval, and they adjourned their meeting from time to time in order that the agreement might be submitted to them. The question is whether the compensation authority were right in taking up that attitude.

We were told at the Bar that in fact no agreement was arrived at; but in strictness we must deal with the matter upon the affidavits, which state that no agreement was submitted to the compensation authority, and it is quite consistent with that statement that an agreement had or had not been come to. But it is really immaterial whether an agreement was arrived at or not, the point made for the applicant being that he was not bound, even if an agreement was made, to submit it to the compensation authority for their approval, but was entitled to have the matter sent direct to the Inland Revenue Commissioners. It is not for us to say whether the attitude taken up by the applicant is or is not reasonable, nor

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is it for us to say whether Parliament ought to have provided that the agreement, if made, must be submitted to the compensation authority. Parliament has not imposed any obligation upon the applicant for compensation to submit an agreement. What the Act in conjunction with the Rules has done is to say that unless there is an approved agreement the Inland Revenue Commissioners are to be notified. The duty to notify arises either when no agreement is submitted or when an agreement submitted is disapproved. Consequently the condition upon which r. 31 becomes operative has happened. The amount of compensation remains to be determined because there is no approved agreement. Rule 27, which says that the compensation authority shall hold a meeting for the purpose of considering whether their approval shall be given to any sum agreed upon by the persons entitled to compensation and submitted to them as the money to be paid as compensation, involves, first, that a sum has been agreed upon, and, secondly, that the agreement has been submitted to the compensation authority. Those two things are conditions precedent to the right of the compensation authority to determine whether their approval shall be given or not. Looking at the Act and Rules, I come to the conclusion that there is no legal obligation upon applicants for compensation to submit an agreement to the compensation authority for approval, and consequently, if they do not submit an agreement for approval, they are entitled to have their claim referred to the Inland Revenue Commissioners under r. 31. Taking that view, this rule must be made absolute.

SANKEY J. I agree. The compensation authority are the persons in charge of the compensation fund. Those who are entitled to compensation may, if they like, agree among themselves the sum to be paid, and, further, they may submit their agreement to the compensation authority for approval. Then the right of the compensation authority arises, which is either to give or to withhold approval; but that right only arises if two conditions precedent have been fulfilled. Those conditions are contained in r. 27, and are, first, an agreement arrived at, and, secondly, the submission of that agreement to the compensation authority. Nowhere is

there to be found in the Rules any obligation upon persons who have agreed the amount of compensation to submit their agreement to the compensation authority. If there is no agreement, or if there is an agreement but it is not submitted to the compensation authority, r. 31 applies. As far as this case is concerned there is no evidence that any agreement was ever come to; certainly no agreement was ever submitted. As, therefore, neither of the two conditions precedent has been fulfilled, the rule must be made absolute.

Low J. Parliament appears to have left the persons interested in the compensation money to select their tribunal for fixing the amount, and in this case the parties considered that circumstances existed which justified them in resorting to the Inland Revenue Commissioners rather than to the local tribunal. The only circumstances under which the matter can be withheld from the Inland Revenue Commissioners are where there is an agreement and that agreement has been approved by the compensation authority. In this case neither of these circumstances appears to exist. There is no evidence that any agreement had been arrived at, but I agree with the judgments already delivered that, even if an agreement had been come to, there is nothing to compel those entering into it to submit it for the approval of the compensation authority. In those circumstances I agree that the rule must be made absolute.

Rule absolute.

Solicitors for applicant: *Godden, Holme & Ward, for Chambers & Son, Sheffield.*

Solicitors for compensation authority: *Church, Rendell, Bird & Co., for F. B. Dingle, Sheffield.*

J. S. H.

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Jan. 19.

WATSON, Appellant *v.* WINCH, Respondent.

Local Government — By-law—Repeal of Statute authorizing By-law — Abrogation of By-law—Norwich Improvement Act, 1879 (42 *&* 43 *Vict. c. cxxv.), s.* 45*—Local Government Act,* 1888 (51 *&* 52 *Vict. c.* 41), *s.* 85.

When a by-law is made under an Act of Parliament the repeal of the Act abrogates the by-law, unless the by-law is preserved by the repealing Act by means of a saving clause or otherwise.

Case stated by justices of Norwich.

(1.) On August 9, 1915, an information was preferred by Edwin Francis Winch, the respondent, the chief constable for the city of Norwich, against Ernest Ivens Watson, the appellant, for that the appellant on July 26, 1915, at Unthank Road in the said city, did unlawfully offend against a certain by-law made on November 18, 1879, in that he did ride a certain bicycle upon the footway there made or set apart for the use or accommodation of foot passengers.

(2.) The information was heard and determined by a Court of summary jurisdiction on August 13, 1915, when the appellant was convicted and fined.

(3.) The by-law under which the information was laid was one of several made for regulating the use in streets and public places of bicycles, velocipedes, and other wheeled conveyances of a like nature therein called "machines." It was in the following terms :— "A person shall not ride or impel a machine upon any footway pavement or causeway made or set apart for the use or accommodation of foot passengers."

(4.) The by-law was made under power given by s. 45 of the Norwich Improvement Act, 1879 (1), and was allowed by the Local Government Board on January 10, 1880.

(5.) Upon the hearing of the information the original by-laws were produced, and it was proved that the appellant rode a bicycle

(1) The Norwich Improvement Act, 1879 (42 & 43 Vict. c. cxxv.), s. 45 : "The corporation may from time to time make by-laws for regulating the use in streets and public places within the city of bicycles, velocipedes, and other wheeled conveyances of a like nature."

at 1.25 P.M. on the day referred to on and along the side of Unthank Road, the portion of the road so ridden on being raised from the carriageway and separated therefrom by a curbstone and used as a footway.

(6.) The appellant contended that the by-law had been repealed as far as bicycles were concerned by s. 85 of the Local Government Act, 1888. (1)

The justices held that the by-law was still operative and convicted the appellant as aforesaid.

The question for the opinion of the Court was whether the by-law was or was not in force at the date of the conviction.

Pritt (*Claughton Scott* with him), for the appellant. When a statute enabling by-laws to be made is repealed the by-laws fall with the Act. This follows as the result of the repeal. "When an Act of Parliament is repealed it must be considered (except as to transactions passed and closed) as if it had never existed": *Surtees* v. *Ellison* (2); *Attorney-General* v. *Lamplough* (3); Lumley on By-laws, p. 65; Glen on Public Health, 13th ed., vol. 2, p. 1552. If it is intended that the by-laws made under the repealed Act shall remain in force, this end is attained by means of a saving clause in the repealing Act: Encyclopædia of Local Government Law, vol. 2, p. 196. For example, see the Municipal Corporations Act, 1882, s. 260, sub-s. 3.

Furthermore, the enactments relating to "carriages" under the Highway Acts are inconsistent with and therefore repeal the by-law.

The respondent was not represented.

(1) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 85: "(1.) The provisions of section 26, sub-section 5, of the Highways and Locomotives (Amendment) Act, 1878, and section 23, sub-section 1, of the Municipal Corporations Act, 1882, in so far as it gives power to the council to make by-laws regulating the use of carriages herein referred to, and all other provisions of any public or private Acts, in so far as they give power to any local authority to make by-laws for regulating the use of bicycles, tricycles, velocipedes, and other similar machines, are hereby repealed, and bicycles, tricycles, velocipedes, and other similar machines are hereby declared to be carriages within the meaning of the Highway Acts . . ."

(2) (1829) 9 B. & C. 750.

(3) (1878) 3 Ex. D. 214.

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LORD READING C.J. The appellant was convicted of infringing a by-law validly made under s. 45 of the Norwich Improvement Act, 1879, which gave the corporation power to make by-laws for regulating the use in streets of bicycles, velocipedes, and other wheeled conveyances of a like nature. By s. 85 of the Local Government Act, 1888, that section of the Norwich Improvement Act was repealed and bicycles, tricycles, velocipedes, and other similar machines were thereby declared to be carriages within the meaning of the Highway Acts. The effect of this latter provision was to apply to bicycles, tricycles, and other machines the code of law applicable to "carriages" as defined by the Highway Acts.

Upon these facts a question arises which has not been decided by any Court, namely, whether the repeal of an Act which enabled a corporation to make by-laws, involving as it does the revocation of the power of the corporation to make them, has the effect of repealing by-laws already made under the power while it existed, or whether the by-laws remain in force notwithstanding the repeal of the statute under which they were made. The question is one of general importance, and the argument on behalf of the appellant makes us regret that the respondent was not represented. We have come to the conclusion that Mr. Pritt's contention is well founded. It was said in *Surtees* v. *Ellison* (1), "It has been long established, that, when an Act of Parliament is repealed, it must be considered (except as to transactions passed and closed) as if it had never existed. That is the general rule; and we must not destroy that, by indulging in conjectures as to the intention of the Legislature." To that passage it is only necessary to make one qualification, namely, that since that case Lord Brougham's Act (13 & 14 Vict. c. 21) and the Interpretation Act, 1889, have been passed, and one must now bear the later Act in mind. It would follow that any by-law made under a repealed statute ceases to have any validity unless the repealing Act contains some provision preserving the validity of the by-law notwithstanding the repeal. Applying that principle to this case, it follows that the by-laws made under the Norwich Improvement Act, 1879, have no longer any validity and that the conviction must be quashed.

In this particular case a further point arises which is not of such

(1) 9 B. & C. 750, 752.

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general application. The repealing statute, i.e., the Local Government Act, 1888, has made other provisions for bicycles. It would be odd that a by-law should exist dealing with bicycles in streets under a local Act concurrently with another code possibly inconsistent with it. As by the Local Government Act, 1888, bicycles are to be dealt with as "carriages" under the Highway Acts and provisions enabling local authorities to make by-laws regulating the use of bicycles are repealed, the clear intention of the Act is to substitute the provisions of the Highway Acts for previously existing by-laws and to repeal the by-laws, in accordance with the rule that when a later statute is passed inconsistent with an earlier the later prevails and the earlier is pro tanto repealed. For these reasons the appeal must be allowed.

SANKEY J. I concur. When a statute is repealed any by-law made thereunder ceases to be operative unless there is a saving clause in the new statute preserving the old by-law. There appear to be two reasons for this: First, because otherwise there might be two inconsistent codes relating to the same matter. The present case is an instance of this. The legislation under the Highway Acts is inconsistent with the by-laws made under the Norwich Improvement Act. Secondly, because the usual practice is to insert in the later statute a section expressly preserving previously made by-laws if it is intended that they shall remain in force.

LOW J. I agree.

Appeal allowed.

Solicitors for appellant: *Hatchett-Jones & Co., for Watson & Everitt, Norwich.*

W. H. G.

1916
Jan. 21.

BOYDEL *v.* LEVANT MINE ADVENTURERS.

Factory—Offence—Summary Proceedings for—Limitation of Time for laying Information—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 146, *sub-s.* 1.

By s. 146, sub-s. 1, of the Factory and Workshop Act, 1901, it is provided with respect to summary proceedings for offences under that Act that "The information shall be laid within three months after the date at which the offence comes to the knowledge of the inspector for the district within which the offence is charged to have been committed, or, in case of an inquest being held in relation to the offence, then within two months after the conclusion of the inquest, so, however, that it be not laid after the expiration of six months from the commission of the offence":—

Held, that, in case of an inquest being held, the information is in time if it is laid within three months after the offence has come to the knowledge of the inspector, or within two months after the conclusion of the inquest, whichever period is the longer, provided it is laid within six months after the commission of the offence.

CASE stated by justices of Cornwall.

On August 18, 1915, an information was laid by the appellant, an inspector of mines and factories, against the respondents charging that they on May 25, 1915, being the occupiers of a non-textile factory at Levant Mine, in the parish of St. Just-in-Penwith, unlawfully neglected to have certain mill gearing securely fenced as required by s. 10, sub-s. 1 (*c*), of the Factory and Workshop Act, 1901.

Upon the hearing of the information it was alleged on behalf of the appellant that on May 25, 1915, certain machinery, which the appellant contended was mill gearing within the meaning of the said section, at the Levant Mine in the occupation of the respondents was unfenced, and that a boy named Pascoe was caught in it and killed, and it was admitted on behalf of the appellant that a coroner's inquest was accordingly held and concluded on the same day, May 25, 1915.

It was thereupon contended for the respondents by way of preliminary objection that, this being a case in which an inquest had been held, the time prescribed by s. 146, sub-s. 1, of the Act within which the information should have been laid was two months

from the conclusion of the inquest on May 25, and that the information not having been laid until August 18, it was out of time and the Court had no jurisdiction to try the case.

The justices upheld the contention of the respondents and dismissed the information.

Branson, for the appellant. The meaning of the section is that in all cases, whether there has been an inquest or not, the information may be laid at any time within three months of the offence coming to the knowledge of the inspector; but that as, in cases where an inquest is held, the three months may expire before the inquest is concluded, the prosecutor shall in such cases have a further period of two months from the conclusion of the inquest in which to lay the information. The object was, in the case of inquests, to extend the period, not to cut it down.

W. T. Lawrance, for the respondents. The intention was to restrict the period in the cases of inquests being held. The offence must in such cases come to the knowledge of the inspector when the inquest is begun; and as in the course of the inquiry all the facts relating to the offence would be disclosed, it was thought that two months from the conclusion of the inquest was a sufficient time for the inspector to make up his mind whether he would prosecute.

LORD READING C.J. The question is whether the information was laid in time. Here the accident happened, the offence came to the knowledge of the inspector, and the inquest was concluded all on the same day. The magistrates thought that the information, which was laid more than two months after that date, was out of time. Prima facie the Act allows a period of three months from the date at which the offence comes to the knowledge of the inspector, and the question is whether the provision that in case of an inquest the information may be laid within two months after the conclusion of the inquest was intended to cut that period down or to extend it. I think it was intended to extend it. It was presumably thought desirable, in cases in which there was an inquest, not to put upon the inspector the burden of taking proceedings for an offence until after the inquest was concluded and all the facts were found; and

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in view of the fact that if there were many adjournments of the inquest, so that it was not concluded until after the three months had expired, it was thought necessary to enlarge the time for laying the information. I think that the magistrates came to a wrong conclusion, and that this appeal must be allowed.

SANKEY J. I agree. The first paragraph of sub-s. 1 gives a period of three months from the date of the offence coming to the knowledge of the inspector for the laying of the information in all cases. I cannot read the second paragraph, relating to the case of an inquest being held, as cutting down the time. I think it is an extending provision.

LOW J. I agree, and having nothing to add.

Appeal allowed.

Solicitor for appellant: *Treasury Solicitor.*

Solicitors for respondents: *Billing & Co., for Grylls & Paige, Redruth.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1916
Jan. 27.

MERSEY DOCKS AND HARBOUR BOARD *v.* BIRKENHEAD CORPORATION.

Rates—General District Rate—Occupation of Land—"Land covered with water"—Graving Docks—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*b*).

Graving docks which are used for the examining and repairing of ships, and into which water is usually admitted only when it is necessary to float ships into or out of them, are not "land covered with water" within the meaning of that expression in s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875.

Where land is sometimes covered with water for the purposes of its use, and sometimes not, it is a question of degree whether upon all the facts it can be said to be "land covered with water" within the meaning of the section or not.

Decision of Scrutton J. [1915] 2 K. B. 312 affirmed.

APPEAL from the judgment of Scrutton J. upon an award of an arbitrator stated in the form of a special case; reported [1915] 2 K. B. 312.

In an arbitration as to the valuation of the dock estate of the Mersey Docks and Harbour Board situate in Birkenhead for the purpose of assessment, a question arose as to whether three graving docks, which were part of the said dock estate, were, for the purposes of the general district rate, rateable at one fourth part only of their net annual value, as being "land covered with water" within s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875. (1)

(1) 38 & 39 Vict. c. 55, s. 211: "With respect to the assessment and levying of general district rates under this Act the following provisions shall have effect; (namely,)

"(1.) General district rates shall be made and levied on the occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor, and shall be assessed on the full net annual value of such property . . . . subject to the following exceptions regulations and conditions; (namely,) . . . .

"(*b*) . . . . the occupier of any land covered with water . . . . shall be assessed in respect of the same in the proportion of one fourth part only of such net annual value thereof."

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The arbitrator found the following facts. The graving docks were excavations with walls, quays, and gates having direct access to the adjoining Birkenhead Docks, of which they formed part, being approached through a wet dock called the West Float. They were used for the purpose of examining and repairing ships. Ships were floated into them, the gates at the entrance were then closed, and the water was then pumped out. After the examination or repair of the ship was carried out the water was readmitted to the dock and the ship was floated out. The water was then generally, but not always, pumped out again, and the dock left dry until such time as water was again required to float vessels into it. On some occasions the next vessel on turn was floated into the dock on the same water. For the purpose of enabling the graving docks to be so used it was necessary for them to be full of water to enable ships to be floated in and out. While the repairs of a ship were in progress, or while for any other reason it was necessary to keep down the water in the dock which gained access by percolation or by leakage through the gates, the water was kept down by pumping. Each graving dock was approached from the Birkenhead Docks by an entrance which was always covered with water up to the dock gate.

On behalf of the Mersey Docks and Harbour Board it was contended that the graving docks were "land covered with water" within s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, it being necessary for their beneficial occupation that there should be water covering the land.

On behalf of the Birkenhead Corporation it was contended that the graving docks were used as engineers' or shipbuilding yards, that water was only temporarily used for the purpose of floating vessels in or out in order to facilitate such user, and the graving docks were in no sense "land covered with water."

The arbitrator was of opinion that the graving docks were not "land covered with water," and were consequently assessable at their full value, and not at one quarter of such value, and he so awarded.

The question for the opinion of the Court was whether the arbitrator's award was right.

Scrutton J. held that the arbitrator's decision was right.

The Mersey Docks and Harbour Board appealed.

Macmorran, K.C., and *Maurice Hill, K.C.* (*W. J. Lias* with them), for the appellants. The graving docks are "land covered with water" within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875. They cannot be beneficially used unless they are sometimes covered with water, the presence of water being essential when ships enter or leave the docks. The principle stated by Lord Alverstone C.J. in *Smith's Dock Co.* v. *Tynemouth Corporation* (1), which was concurred in by Farwell and Kennedy L.JJ., applies, namely, that the words "land covered with water" in s. 211 "must include any case where the presence of water over the land is essential to the beneficial occupation of the land for the purpose for which it is occupied." The test, therefore, is whether the land can be used for the purpose for which it is occupied unless it is for a substantial time covered with water. These graving docks could not be used as such unless they were full of water occasionally for a substantial period. The effect of the lock gates excluding the water is similar to that of the pontoon in *Smith's Dock Co.* v. *Tynemouth Corporation.* (2) In *East London Waterworks Co.* v. *Leyton Sewer Authority* (3) filter beds, which were sometimes covered with water and at other times not, were held to be "land covered with water," Cockburn C.J. saying that "they are intended to hold water, though they do not at all times hold water." That observation is in point here.

Further, the graving docks are constructed as accessories to the wet docks and should be rated as part of and on the same footing as the wet docks: *Reg.* v. *Neath Overseers.* (4)

Ryde, K.C., and *A. H. Maxwell*, for the respondents, the Birkenhead Corporation, were not called upon.

SWINFEN EADY L.J. This appeal raises the question whether three graving docks ought to be assessed to the general district rate as "land covered with water" within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875. The ordinary condition of the graving docks is that they are dry, the water being excluded by means of gates. When it is intended to bring a ship into one of the docks the water is admitted into it until the water in the dock

(1) [1908] 1 K. B. 948, 956.
(2) [1908] 1 K. B. 948.
(3) (1871) L. R. 6 Q. B. 669, 672.
(4) (1871) L. R. 6 Q. B. 707.

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is on the same level as the water in the adjoining wet dock. The ship is then floated in, the dock gates are closed, and the water is pumped out so as to enable the work on the ship to be executed. While the work is proceeding the dock remains dry, and the ship rests on blocks at the bottom of the dock. On completion of the work the water is again admitted and the ship is floated out. The water is then pumped out and the dock remains dry, but if, as I understand, there is another ship ready to go in or immediately expected, or if as a matter of business it is not considered worth while to incur the expense of pumping the water out at once, the water remains in the dock pending the arrival of a ship. That is a question of management. Speaking generally—and this is how the appeal was opened—except when water is admitted for the purpose of floating a ship in or out the dock remains dry. The normal condition of the docks is that they are dry.

In these circumstances the question is whether these graving docks are "land covered with water" for the purpose of the general district rate. Scrutton J. rightly said that the question is one of degree. It is not essential, in order to bring a case within the section, that the land should for every hour in the course of the year be covered with water. It is a question of degree, and one must look at the facts of each case. In this case I am satisfied upon the facts that the land upon which these docks are constructed cannot be treated as "land covered with water." In *Smith's Dock Co.* v. *Tynemouth Corporation* (1) Lord Alverstone C.J. said: "Now what ought to be the construction for the present purpose of the words of s. 211, sub-s. 1 (*b*), 'land covered with water'? I hesitate in this case to attempt to give any exhaustive definition. I daresay other cases might arise, which would shew that any such attempted definition would require amplification or explanation. But in my opinion the words must include any case where the presence of water over the land is essential to the beneficial occupation of the land for the purpose for which it is occupied." That language was used in a case where water was always present over the land, and it ought not to be taken to mean that wherever the presence of water over the land for any period of time, however short, is essential to the beneficial occupation of the land, the land

(1) [1908] 1 K. B. 956.

is to be treated as land covered with water. In *East London Waterworks Co.* v. *Leyton Sewer Authority* (1) the normal condition of the "series of filter beds or reservoirs" was that they contained water, though sometimes they did not, having been emptied for the purpose of cleansing the filtering medium; and the Court held that these beds or reservoirs were "land covered with water." Blackburn J. said: "With regard to the reservoir, some doubt may be entertained; but I think the question is one of degree." The contention urged against that view was that the surface of the ground, being covered with arches, the tops of which supported the reservoir containing the filter beds and the water, was not land covered with water, but was like a cistern on the top of a house. To that Blackburn J. said: "I think that the arches being built on the land may be considered part of the land. Whether the land was or was not covered with water, the use of it was to hold the water, and in effect it is permanently covered with water." Therefore in that case the land, the use of which was to hold water, was treated as being in effect permanently covered with water. In the present case the graving docks cannot be considered as land covered with water. Their normal condition is that of dry docks. In my opinion the decision of Scrutton J. was right, and the appeal fails.

PICKFORD L.J. I agree. I think that Scrutton J. proceeded upon the right principle, and that his decision is correct.

BANKES L.J. I agree. Sect. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, gives a partial exemption from rating in respect of the general district rate to "land covered with water." The question whether any particular land comes within that partial exemption is a question of degree. Clearly it is not necessary that the land should be permanently covered with water without any interruption. For instance, land between high and low water mark would come within the exemption; and land which is flooded owing to a subsidence in a colliery district, but which in times of extreme drought may be dry for a week or two in the year, would also come within the exemption. On the other hand, land which is

(1) L. R. 6 Q. B. 669, 673.

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MERSEY DOCKS AND HARBOUR BOARD v. BIRKENHEAD CORPORATION.

only flooded occasionally in times of heavy rainfall would not come within the exemption. In my opinion this particular land is land which is occasionally flooded for the purposes of the business carried on there, and is therefore not "land covered with water" within the exemption. The view taken by the learned judge was right.

Appeal dismissed.

Solicitors for appellants: *Rawle, Johnstone & Co., for W. C. Thorne, Liverpool.*

Solicitors for respondents: *F. Venn & Co., for J. Fearnley, Birkenhead.*

W. F. B.

1916

Jan. 27.

KNOLL *v.* RENSHAW.

Revenue —Stamp Duty—Medicine—"Held out or recommended to the public"—"Entire" Drug—Medicines Stamp Act, 1812 (52 *Geo.* 3, *c.* 150), *Schedule.*

The appellants, wholesale chemists, issued a price list of drugs to retail chemists but not to the public generally. They sold to a person, who produced an order purporting to come from a retail chemist, a bottle of tablets of a drug described and priced in their list which was not stamped for the duty chargeable under the Medicine Stamp Act, 1812. The list contained a recommendation of their preparations and stated that medical literature and advertising matter would be supplied on application, and it described the use of the drug. The drug was mixed with starch and milk sugar, but the milk sugar did not affect the medicinal quality of the drug, and the starch had no medicinal effect:—

Held, that there was evidence that the appellants had by advertisement or printed papers held out or recommended the drug to the public as beneficial for human ailments, and that it was not "entire without any mixture or composition with any other drug or ingredient," within the meaning of the schedule to the Medicines Stamp Act, 1812.

CASE stated by a magistrate for the city of London.

The respondent preferred an information against the appellants for vending or exposing for sale a bottle containing a preparation and composition to be used as a medicine and liable to the duty

chargeable in respect of medicines under 52 Geo. 3, c. 150 (1), without a paper cover duly stamped for the duty chargeable.

The appellants were wholesale chemists; they issued a price list, which was addressed to retail chemists and not distributed to the public; a preparation called Ovaraden was described in the list. The list stated that the appellants' preparations "are based on well-established scientific foundations, and are only put on the

(1) The Medicines Stamp Act, 1812 (52 Geo. 3, c. 150), s. 2, imposes a penalty of 10*l.* upon any person who utters, vends, &c., any bottle, &c., containing any of the drugs, &c., mentioned and set forth in the schedule annexed to the Act without a paper cover duly stamped for denoting the duty charged.

THE SCHEDULE.

"And also all other pills, powders, lozenges, tinctures, potions, cordials, electuaries, plasters, unguents, salves, ointments, drops, lotions, oils, spirits, medicated herbs and waters, chemical and officinal preparations whatsoever, to be used or applied externally or internally as medicines or medicaments for the prevention, cure, or relief of any disorder or complaint incident to or in anywise affecting the human body, made, prepared, uttered, vended, or exposed to sale by any person or persons whatsoever wherein the person making, preparing, uttering, vending, or exposing to sale the same hath or claims to have any occult secret or art for the making or preparing the same, or hath or claims to have any exclusive right or title to the making or preparing the same, or which have at any time heretofore been, now are, or shall hereafter be prepared, uttered, vended or exposed to sale under the authority of any letters patent under the Great Seal, or which have at any time heretofore been, now are, or shall hereafter be, by any public notice or advertisement, or by any written or printed papers or handbills, or by any label or words, written or printed, affixed to or delivered with any packet, box, bottle, phial, or other inclosure containing the same, held out or recommended to the public by the makers, venders, or proprietors thereof as nostrums or proprietary medicines, or as specifics, or as beneficial to the prevention, cure, or relief of any distemper, malady, ailment, disorder, or complaint incident to or in anywise affecting the human body."

"*Special Exemptions.*

"All medicinal drugs whatsoever which shall be uttered or vended entire without any mixture or composition with any other drug or ingredient whatsoever by any surgeon, apothecary, chemist, or druggist who hath served a regular apprenticeship, or by any person who hath served as a surgeon in the Navy or Army under any commission or appointment duly entered at the War Office or Navy Office, or by any other person whatsoever licensed to sell any of the medicines chargeable with a stamp duty."

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KNOLL v. RENSHAW.

market after thorough pharmacological and chemical tests. The method of manufacture is, in most instances, patented in nearly all civilised countries, and the names of the preparations are protected by trade marks"; and "medical literature and advertising matter gladly supplied on application." Ovaraden was described as "Standardised dried ovarian extract. Used in menstrual disorders, chlorosis, &c., and during the menopause"; and wholesale and retail prices were stated.

A Customs and Excise officer called at the appellants' premises and handed in an order form purporting to come from a retail chemist, and, without any inquiry as to who he was, an assistant sold him a bottle of Ovaraden tablets, which was not stamped. The Ovaraden tablets consisted approximately of 50 per cent. starch, 25 per cent. milk sugar, and 25 per cent. of an organic extract. The organic extract was an entire drug. The admixture of the milk sugar did not affect the medicinal property of the entire drug, though it might be a laxative; and the starch had no medicinal effect.

There was no evidence of any actual holding out or recommending of Ovaraden to the public, except the issue of the price list to retail chemists and the contents of the price list. The appellants were licensed to sell medicines chargeable with stamp duty. The appellants contended that a drug did not cease to be an entire drug within the meaning of the Act by reason only of admixture with medicinally inert materials. The respondent contended that a drug ceased to be an entire drug if mixed with any other material.

The magistrate found that the Ovaraden tablets were by advertisement or printed papers held out or recommended to the public by the appellants as beneficial to the prevention, &c., of a complaint incident to or affecting the human body, and that they were not medicinal drugs vended entire without any mixture or composition with any other drug or ingredient; and he therefore convicted and fined the appellants.

Kerly, K.C. (*J. Hunter Gray* with him), for the appellants. This case does not come within the Act, because this drug was not "held out or recommended to the public" by the appellants within the meaning of the provisions of the schedule to the Medicines Stamp

Act, 1812. The price list was issued to the trade only and not to the public at all; and the retail chemists were in no way the agents of the makers to pass on to the public the statements in the price list. The case is quite different from *Smith* v. *Mason & Co.* (1); in that case the chemists were retailers and issued a price list to the public. It cannot be said that the class of retail chemists are in any sense "the public."

This was an "entire" drug within the special exemptions in the schedule. The special finding in this case, that the milk sugar and starch did not affect the medicinal property of the drug and had no medicinal effect, shows that the drug was an entire drug and distinguishes this case from *Smith* v. *Mason & Co.* (1) These ingredients were merely a receptacle for the entire drug, like a bottle. There was therefore no evidence that the appellants held out or recommended this drug to the public and no evidence that it was not an entire drug. [They referred to *Farmer* v. *Glyn-Jones*. (2)]

Sir G. Cave, *S.-G.* (*Daldy* with him), for the respondent. There was evidence upon which the magistrate could properly find that this drug was held out or recommended to the public. In the first place, the retail chemists are the makers' public, and the public within the meaning of the schedule. Further, the statements contained in the price list are evidence of a holding out or recommendation to the public; they are intended to induce the public to buy and to be communicated to the public by the retail chemists for that purpose. The finding of fact upon that point cannot be questioned.

A drug only comes within the special exemptions as an entire drug if there is no mixture or composition with any other ingredient whatsoever. Here there was a mixture with other ingredients, and the case clearly is not within the exemptions.

[He was stopped by the Court.]

Kerly, *K.C.*, replied.

LORD READING C.J. The question in this case is whether there was evidence before the magistrate which entitled him, as a matter of law, to come to the conclusion that the offence had been committed, and it is not for us to consider whether or not we should

(1) [1894] 2 Q. B. 363. (2) [1903] 2 K. B. 6.

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KNOLL v. RENSHAW.

Lord Reading C.J.

have come to the same conclusion on the same evidence. On examining the case it seems clear to me that there is evidence to support the finding.

The case has been very ingeniously argued by Mr. Kerly. He has taken two points, which were taken before the magistrate. The one is that there is no evidence that the appellants ever held out or recommended to the public this particular preparation, within the meaning of the statute; and, further, that, if there was any such holding out, it is not a holding out within the meaning of the Act, because the retail chemist is not shown to be the appellants' agent to pass on any writing which would make the manufacturer responsible. The point of the case is this: The manufacturer is anxious to push his wares. He issues a price list to the retail chemist, who is his means of distribution to the public; the retail chemist, of course, buys at the trade price. There is on this particular preparation called "Ovaraden" a fixed price at which the preparation is to be sold to the ordinary members of the public by the retailer. There is nothing on the face of the preparation to indicate what ills the preparation is intended to cure, or for what purpose it is recommended; and on looking at it it conveys nothing. The public would only know that there are tablets there; it does not say, or indicate in any way, for what purpose they are to be used, or how they are to be used. The object of the manufacturing chemist and the retail chemist is to supply as much of this preparation, so packed, to the public as possible; their common interest is to sell. Can it be said that, with the statement in writing before the retail chemist which is contained in the price list, and which states the particular disorders or illnesses for which these tablets are recommended, this is not a holding out or recommendation to the public? The magistrate has come to the conclusion, on the facts which I have stated, that it did constitute a holding out to the public; and it seems to me impossible for us to say on the facts that the manufacturer has not held out or recommended to the public this preparation for the purpose of curing certain disorders or illnesses, as stated in the price list. The magistrate having come to that conclusion, if we hold, as we do, that as a matter of law we cannot differ from it, the only remaining point is whether it can be said that this was a medicinal drug vended entire without any

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drug or other ingredient mixed with it, within the words of the second of the special exemptions in the schedule to the Act. If it is a medicinal drug so vended entire, then it is exempt; but looking at the facts, that these tablets consist approximately of 50 per cent. starch, 25 per cent. milk sugar, and 25 per cent. of an organic extract, then, notwithstanding that the organic extract is an entire drug, it is impossible to say, as a matter of law, that there is no evidence upon which the magistrate could find that it was not a medicinal drug vended entire without any drug or ingredient mixed with it. We had a very interesting and fascinating argument developed by Mr. Kerly, but it was based upon false premises. He assumed that the ingredient with which the drug is mixed is to be treated as being the same as a bottle in which the drug is placed and thus demonstrated that it made no difference if the entire drug were put into such a receptacle for the purpose of its being taken. Of course, if one could treat the bottle and the drug as ingredients which could be mixed together, that might be, perhaps, a very sound analogy; but that cannot be done—they are two entirely separate and distinct things; the bottle does not mix with the drug, but the starch and the milk sugar do mix with the drug; and the consequence is that when it is found as a fact that they were mixed with the drug that argument fails. The appeal must therefore be dismissed.

SANKEY and LOW JJ. concurred.

Appeal dismissed.

Solicitor for appellants: *G. B. Ellis.*

Solicitor for respondent: *Solicitor of Customs and Excise.*

J. H. W.

C. A.
1916
Jan. 31.

[IN THE COURT OF APPEAL.]

NESS *v.* O'NEIL.

[1915 N. 1255.]

Courts (Emergency Powers) Act, 1914 (4 & 5 *Geo.* 5, *c.* 78), *s.* 1, *sub-s.* 1 (*b*) —*Lessor and Lessee—Forfeiture for Non-payment of Rent—Action to recover Possession—"Exercise any right of re-entry"—Leave of Court.*

Leave of the Court is not necessary under s. 1, sub-s. 1 (*b*), of the Courts (Emergency Powers) Act, 1914, to entitle a landlord to bring an action against his tenant to recover possession of the demised premises under a clause of re-entry for non-payment of rent. Leave, however, is necessary for the issue of a writ of possession upon a judgment obtained in such an action.

Observations of Warrington J. in *In re Farnol Eades Irvine & Co.* [1915] 1 Ch. 22 approved.

APPEAL from an order of Rowlatt J. at chambers.

The action was brought to recover possession of certain premises in London. By an agreement in writing one Ness agreed to let and the defendant agreed to take the premises for a term of three years from September 29, 1908, at a rent payable monthly in advance on the last day of each month, and there was a provision for re-entry on non-payment of rent for ten days after the same became due. After the expiration of the term the defendant continued in possession of the premises on the terms and conditions contained in the agreement. On November 30, 1915, a month's rent became due from the defendant and remained unpaid for ten days. On December 14 the plaintiff, the executrix of the lessor, who had died, brought this action to recover possession. The plaintiff had made no application under the Courts (Emergency Powers) Act, 1914 (1),

(1) 4 & 5 Geo. 5, c. 78, s. 1: "(1.) From and after the passing of this Act no person shall—

"(*a*) proceed to execution on, or otherwise to the enforcement of, any judgment or order of any Court (whether entered or made before or after the passing of this Act) for the payment or recovery of a sum of money to which this subsection applies, except after such application to such Court and such notice as may be provided for by rules or directions under this Act; or

"(*b*) levy any distress, take, resume, or enter into

for leave to bring the action. Upon an application under Order XIV., r. 1, the Master gave the plaintiff leave to sign final judgment for possession and ordered that there should be no stay of execution under the Courts (Emergency Powers) Act, 1914, as to possession after seven days. Rowlatt J. affirmed this order.

The defendant appealed.

Stutfield, for the defendant. The action cannot be brought without the leave of the Court. The plaintiff by issuing the writ claiming possession is "exercising a right of re-entry" within s. 1, sub-s. 1 (*b*), of the Courts (Emergency Powers) Act, 1914, and before she can exercise any such right she must apply to the Court by originating summons under r. 4 of the Courts (Emergency Powers) Rules, 1914. An action to recover possession is equivalent to a re-entry: *Moore* v. *Ullcoats Mining Co.* (1); *Jones* v. *Carter*. (2) The words "exercise any right of re-entry" in sub-s. 1 (*b*) include an action to recover possession as well as a re-entry without an action. The dictum of Warrington J. in *In re Farnol Eades Irvine & Co.* (3), that the matters mentioned in clause (*b*), except "foreclose," refer to things which can be done independently of and without any order of the Court, cannot be supported. Sub-s. 1 (*a*) does not apply to this judgment, as it is not a judgment "for the payment or recovery of a sum of money." Therefore if the present action can be brought without the leave of the Court there is nothing to prevent execution being issued, and the defendant has no protection.

Next, the right of re-entry being suspended by sub-s. 1 (*b*) until the leave of the Court is obtained, the cause of action to enforce that

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possession of any property, exercise any right of re-entry, foreclose, realise any security (except by way of sale by a mortgagee in possession), forfeit any deposit, or enforce the lapse of any policy of insurance to which this subsection applies, for the purpose of enforcing the payment or recovery of any sum of money to which this subsection applies, or in default of the payment or recovery of any such sum of money, except after such application to such Court and such notice as may be provided for by rules or directions under this Act . . . ."

(1) [1908] 1 Ch. 575, 587.
(2) (1846) 15 M. & W. 718, 725.
(3) [1915] 1 Ch. 22, 24.

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right is suspended also: *Durrell* v. *Gread.* (1) The basis of the action is the existence of a right to re-enter, and when that is suspended for a time it follows that the right to bring an action to recover possession is suspended also. [*Perry* v. *Fitzgerald* (2) was also referred to.]

Morton Smith, for the plaintiff, was not called upon.

SWINFEN EADY L.J. This is an appeal from an order of Rowlatt J. at chambers affirming an order of the Master giving the plaintiff leave to sign final judgment in an action for possession and to issue a writ of possession after the expiration of seven days. It is not disputed that the rent was ten days in arrear when the writ in the action was issued, and it is not suggested that the defendant is able to make any case under s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1914, namely, that time should be given for payment on the ground that she is unable immediately to make the payment by reason of circumstances attributable, directly or indirectly, to the present war. The point raised is that the plaintiff is not entitled to issue the writ of summons claiming possession by virtue of her right of re-entry until she has first obtained the leave of the Court upon an originating summons issued for that purpose. It is said that upon the true construction of s. 1, sub-s. 1 (*b*), the plaintiff by bringing the action is proceeding to "exercise a right of re-entry," and that she cannot do that until leave has been obtained.

It is to be observed that the proceedings mentioned in clause (*b*), whereby a person to whom money is owing may enforce payment thereof, are all, with one exception, proceedings which can be taken independently and without an order of the Court—proceedings, that is to say, of a summary nature. "Levy any distress, take, resume, or enter into possession of any property, exercise any right of re-entry,"—I omit the word "foreclose"—"realise any security, ... forfeit any deposit, or enforce the lapse of any policy of insurance," all refer to things which can be done out of Court and without its intervention. It is said that the word "foreclose" refers to a proceeding which can only be taken in Court. That expression was discussed by Warrington J. in *In re Farnol Eades*

(1) [1914] W. N. 382; 84 L. J. (K.B.) 130. (2) [1915] 2 I. R. 11.

Irvine & Co. (1) In that case the plaintiff in a debenture-holder's action claimed, among other relief, foreclosure, and the learned judge held that leave was not necessary before commencing the action. He said: "Now I return to the word 'foreclose.' What does that mean? Foreclosure as a thing which can be done by a person has no meaning. Foreclosure is done by the order of the Court, not by any person. In the strict legal sense it is nothing more than the destruction of the equity of redemption which has previously existed. What then is meant in this clause by the prohibition against foreclosure? I am not prepared to say what it does mean, but I am prepared to say that in my opinion it does not mean to prevent a person from issuing a writ of summons for foreclosure. All that the Court does in such an action is to direct an account of what is due on the security and if it is not paid within a certain time then that the equity of redemption shall be foreclosed. But even that is not foreclosure absolute, to obtain which the mortgagee has to get a further order. Now looking at the general intention of the Act, what possible object can there be in preventing a man from taking the preliminary proceedings as the result of which he may obtain a judgment for foreclosure from the Court? I see none whatever. It seems to me that, whatever may be the meaning of the expression 'foreclose' in this Act, it does not mean that a man may not put himself in a position to obtain an order of foreclosure from the Court. In my opinion, therefore, the Act does not prevent the issue of a writ or originating summons for foreclosure or the issue of a writ of summons in a debenture-holder's action for the realization of the security." I agree with that statement. The plaintiff is entitled without leave of the Court, not to proceed in a summary way—she is not doing that—but to exercise her right to bring an action to recover possession. A judgment for possession recovered in an action on a proviso for re-entry for non-payment of rent is a means of enforcing payment of the rent in arrear; it is in effect a judgment to enforce the payment of money. This is illustrated by the fact that upon payment of the rent in arrear and all costs the defendant can obtain relief. It is not suggested that a writ of possession on such a judgment can be obtained without the leave of the Court. The plaintiff has obtained

(1) [1915] 1 Ch. 22, 24.

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Swinfen Eady L.J.

that leave. A tenant is amply protected, inasmuch as leave is necessary before the landlord can either take possession in a summary way or obtain a writ of possession upon a judgment, and on any application for such leave the Court may, under sub-s. 2, in its absolute discretion stay execution or defer the operation of the landlord's remedy. There is no ground, however, for the contention that the writ of summons claiming possession cannot be issued without leave of the Court. The appeal therefore fails.

PICKFORD and BANKES L.JJ. agreed.

Appeal dismissed.

Solicitor for plaintiff: *F. J. Abbott.*

Solicitors for defendant: *Lloyd, Richardson & Co.*

W. F. B.

1916

Feb. 2.

SLY *v.* RANDALL.

Revenue—Carriage—Licence—Expiration of Period allowed for paying Duty—Person summoned for keeping Carriage on Day within that Period—Revenue Act, 1869 (32 & 33 *Vict. c.* 14), *ss.* 18, 22, 27.

Sect. 18 of the Revenue Act, 1869, provides for a licence being taken out annually by every person who keeps a carriage. Sect. 22 requires such person to pay the duty for which he is liable before the expiration of the month of January in each year, or before the expiration of twenty-one days from the day of his commencing to keep or use the carriage. Sect. 27 imposes a penalty for failure to pay the duty and obtain the proper licence within the time prescribed by the Act:—

Held, that if a person fails to take out a licence within the periods allowed by s. 22 for payment of the duty he can thereafter be summoned and made liable to the penalty imposed by s. 27 for having kept a carriage without a licence on a date within those periods.

CASE stated by Essex justices.

An information was preferred on September 24, 1915, by the appellant, Sly, an officer of the Essex County Council, under s. 27 of the Revenue Act, 1869 (1), against the respondent, Edith R.

(1) Sect. 18 of the Revenue Act, 1869 (32 & 33 Vict. c. 14), provides that on and after January 1, 1870, there shall be granted duties on, inter alia, every carriage "and such duties . . . . shall be paid

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SLY v. RANDALL.

Randall, for that she on May 8, 1915, unlawfully kept a carriage, for the keeping and using of which a licence was required, without having taken out a licence.

At the hearing the following facts were proved :—

The appellant on May 8, 1915, saw a motor car, L. H. 7237, in use in High Road, Leytonstone, which car was registered in the name of the respondent on April 29, 1915. On August 28, 1915, the appellant called on the respondent and asked her why she had not taken out a licence in respect of the car. She said, "I used it for about a month after it was registered. Some cogs of the back axle were broken and the car has since been laid up and not used." The appellant saw the car, which was then under repair. The respondent only took out the proper licence for the car on August 28, 1915.

The appellant contended that the liability on the respondent commenced on April 29, 1915, the day the car was registered.

For the respondent it was contended that no offence had been committed on May 8, 1915, because twenty-one days of grace are allowed by s. 22 of the Revenue Act, 1869, in which to take out the licence.

The justices were of opinion that no offence had been committed

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annually upon licences to be taken out . . . . by the person who . . . . shall keep the carriage . . . . and the said licences shall be in such form . . . . and shall be dated on the day of granting the same, and shall expire on the thirty-first day of December then next following."

Sect. 22 : "Every person . . . . keeping any carriage . . . . shall fill up and sign a declaration in the prescribed form . . . . And such person shall deliver the declaration so filled up and signed by him, and shall pay the duties to which he shall by such declaration appear to be liable . . . . before the expiration of the month of January in each year, or before the expiration of twenty-one days from the day of his commencing . . . . to keep or use any carriage . . . ."

Sect. 27 : "Every person who shall . . . . keep any carriage . . . . without having a proper licence under this Act . . . . shall forfeit the penalty of twenty pounds over and above any other penalty to which such person may be liable ; provided that such penalty shall not be recoverable where the defendant in any proceeding for the recovery of the same shall prove to the satisfaction of the justices . . . . that he had delivered a declaration, and paid the proper duties, and obtained a proper licence, within the time prescribed by this Act . . . ."

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on May 8, 1915, and accordingly they dismissed the summons without going further into the facts. The question was whether they were right in so doing.

Naldrett, for the appellant. The respondent having commenced to keep a carriage on April 29 was by s. 22 of the Revenue Act, 1869, bound to take out a licence within twenty-one days thereafter, and as she failed to do so she rendered herself liable to the penalty imposed by s. 27.

G. Marsden (*J. A. Slater* with him), for the respondent. The justices were right in holding that no offence had been committed by the respondent on May 8. Sect. 27 of the Act imposes a penalty on a person who keeps a carriage without having a proper licence under the Act. By s. 22 the respondent was not obliged to take out a licence for twenty-one days after April 29. Therefore on any day during those twenty-one days the respondent could not be described as a person who had not a proper licence under the Act, since the Act did not require her to have one. Sect. 27 has no application in those circumstances. This case must be treated as if it had been heard on May 8, on which date the respondent was under no obligation to have a licence. The proviso to s. 27 was inserted for the protection of a person who may have lost his licence, for without that proviso he would be liable, as a licence is a document (see s. 26) which he must have in his possession to comply with the first part of s. 27.

Naldrett in reply. The obligation to have a licence commences from the date when a person begins to keep a carriage: see s. 18, which says that the licence is to be taken out annually. It is true that a certain time is allowed within which to pay the duty, and, accordingly, till that period has expired the owner of the carriage cannot be summoned; but the proviso to s. 27 clearly shows that if a proper licence is not taken out within the time prescribed by the Act the penalty imposed by the earlier words of that section is incurred.

LORD READING C.J. If the summons in this case had been taken out within twenty-one days from April 29, the day when the respondent commenced to keep the car, she would not have been liable to

a penalty, as the twenty-one days allowed her by the Act in which to take out the licence would not have expired. That, however, is not the case with which we have to deal. The respondent was in fact summoned long after the expiration of the twenty-one days, although the summons charged her with keeping a carriage without a licence on a date within that period. By the Revenue Act, 1869, the obligation is imposed upon every person who keeps a carriage to make a proper declaration with regard to the same and to pay the duty. Sect. 18 says that on and after January 1, 1870, this duty shall be paid annually and that the licence shall expire on December 31 in each year. Sect. 22 allows a certain time within which the duty may be paid ; it says that if a person has a carriage on January 1 he shall pay the duty by January 31, and if he commences to keep a carriage at a later date in the year he shall pay the duty within twenty-one days from that date. If he fails to pay the duty within those periods, s. 27 imposes a penalty. The language of that section is not very clear, but as we are satisfied that there is no time during which a person can keep a carriage without being liable to the duty, it must follow that if during the period given for its payment, that is the whole of the month of January or the period of twenty-one days, whichever is applicable, the licence is not taken out, then there is a liability to the penalty imposed by s. 27 if the summons is taken out after those periods have expired. The proviso to s. 27 affords protection either if at the time the person is summoned there are still some days to run within which he is allowed to pay the duty, or if he proves that in fact he made the proper declaration and paid the duty but is unable to produce the licence. In my opinion, therefore, the justices were wrong in their construction of the Act, but as the case was not fully heard it must be remitted to them to be further dealt with.

SANKEY J. I agree. Every person keeping a carriage must pay duty as from January 1 or as from the date when he begins to keep the carriage, but he has a month in the one case and three weeks in the other within which to pay the duty. He cannot therefore be summoned during the said month or the three weeks, but if he fails to take out a licence by the end of those periods he can be summoned

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for having kept a carriage without a licence on a day within the month or three weeks.

Low J. I agree.

Appeal allowed. Case remitted.

Solicitors for appellant: *Sharpe, Pritchard & Co., for J. H. Goold, Chelmsford.*

Solicitors for respondent: *Shaw & Bristowe.*

J. S. H.

1916
Feb. 2.

WEBSTER *v.* WEBSTER.

[1915 W. 3003.]

Husband and Wife—Action by Husband against Wife—Action to restrain Wife from purporting to pledge Credit of Husband—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75).

An action will not lie by a husband against his wife for an injunction to restrain her from pledging his credit.

ACTION tried before Rowlatt J. without a jury.

The plaintiff brought this action against his wife claiming only "an injunction restraining the defendant her servants or agents from pledging or seeking to pledge the plaintiff's credit or from incurring any debt or liability in his name or from doing any act or thing whereby she exposes or may expose the plaintiff to contractual liability or the risk of being sued in respect of such liability."

The parties were married in July, 1915, but had lived apart since the end of September. While they were living apart the defendant purchased on credit in the name of her husband clothes, jewellery, and other personal articles to the value of about 1000*l.*, and the bills were sent by the tradesmen to the plaintiff. The plaintiff alleged that he believed that the defendant intended to continue to purchase goods upon credit in his name.

H. A. McCardie and *R. O'Sullivan*, for the plaintiff. It is clear upon the authorities that an injunction can be granted restraining

one person from using the name of another without his authority whereby he is or may be exposed to some risk by the use of his name: *Routh* v. *Webster* (1); *Walter* v. *Ashton.* (2) In this case the plaintiff would be exposed to the risk of claims and the annoyance of actions and the incurring of costs in defending actions by the unauthorized use of his name by the defendant.

It makes no difference that the claim for an injunction is in an action by husband against wife. By s. 1, sub-s. 2, of the Married Women's Property Act, 1882, a married woman is made capable of "suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole." It is true that by s. 12 "no husband or wife shall be entitled to sue the other for a tort"; but an action for an injunction only is not an action in which the plaintiff is suing for a tort; the claim for an injunction is entirely independent of any tort.

J. B. Matthews, K.C., and *H. Maddocks*, for the defendant. This action will not lie. At common law there could not be any legal proceedings between husband and wife except that she might exhibit articles of the peace against him if in personal danger from his violence. The reason for this was that they were one person in law: *Phillips* v. *Barnet.* (3) In equity the husband could not sue his wife in tort or contract unless she had intended to bind her separate estate, for equity took cognizance only of proceedings in respect of her separate estate: *Butler* v. *Butler.* (4) The Married Women's Property Act, 1882, only enlarges the capacity of a married woman to sue or be sued by her husband in contract or in respect of her separate estate, for s. 12 expressly enacts that they cannot sue each other for a tort: *Tinkley* v. *Tinkley.* (5) Therefore the Married Women's Property Acts do not affect this case and the common law rule that a husband cannot sue his wife at all applies. This action is either an action for a tort or it is without any foundation at all. Where there is no question of a contract an injunction cannot be granted except in respect of an apprehended tort: *Earl Cowley* v. *Countess Cowley* (6); *White* v. *Mellin.* (7)

(1) (1847) 10 Beav. 561.
(2) [1902] 2 Ch. 282.
(3) (1876) 1 Q. B. D. 436.
(4) (1885) 16 Q. B. D. 374.
(5) (1909) 25 Times L. R. 264.
(6) [1901] A. C. 450.
(7) [1895] A. C. 154.

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McCardie in reply. The claim here is based solely upon the equitable remedy by injunction, and therefore the action is not one for a tort within s. 12 of the Act of 1882.

ROWLATT J. This action is brought by the husband to restrain his wife from pledging his credit. The parties were not in fact living together when these matters arose, but I do not propose to say anything as to whose fault it was. On any view of the cause of separation it seems to me that the articles for which the wife in fact pledged her husband's credit were quite unreasonable and entirely beyond any authority she could possibly have had.

The question is whether this action is competent. For the plaintiff it was put upon the principle of *Routh* v. *Webster* (1), before Lord Langdale M.R., and it was contended that that principle extended so as to enable any person to obtain an injunction restraining another who assumed without authority to pledge that person's credit and thereby brought him into peril of being harassed by litigation which might or might not succeed but in any case would be a damnification. Then it was said that such an action can be brought as much against a wife as against any one else who wrongly assumes to pledge the credit of another. Before the Married Women's Property Act, 1882, there can be no doubt that such an action would not lie by the husband against his wife at common law; and counsel for the plaintiff has not been able to produce any precedent for any suit of that kind or any analogous suit by a husband in equity before that Act. I can conceive that there must have been very many wives who committed all sorts of excesses in relation to their husbands' property or interests, but it does not appear that any husband ever succeeded in getting his wife restrained by a Court of Equity. As I understand the doctrine of the Courts of Equity, I think that they would not have extended their relief to cases of that kind not involving considerations of property as between the spouses.

Then, does the Married Women's Property Act, 1882, enable such an action as this to be brought? It is difficult to lay one's finger upon the precise words in the Act which have made it competent for husbands to bring actions against wives such as we

(1) 10 Beav. 561.

constantly see in the Courts. Sect. 12 provides that "no husband or wife shall be entitled to sue the other for a tort"; but the provision that the husband may sue his wife, with that exception, is nowhere explicitly stated in the Act. It is said for the plaintiff, and probably rightly, that s. 1, sub-s. 2, is wide enough to give that power. Therefore the result appears to be that a husband may sue his wife for anything, except that he cannot sue her for a tort.

The question then is whether an action against a person for assuming to pledge the credit of the plaintiff without his authority is an action for a "tort" within the meaning of s. 12 of the Act of 1882. Now the term "tort" is not a very accurate expression, and perhaps it is unfortunate that it has been used for the purpose of classification in a statute, but it seems to me that this action is an action for a "tort" within the meaning of s. 12. I understand that the ground of such a claim, assuming it would lie, against any professing agent would be that the defendant was making a false statement about the plaintiff to other persons whereby damage would be caused, or had been caused, to the plaintiff. It seems to me that damages, if suffered, would be recoverable in such an action, because the defendant without justification would have done an act which to his knowledge would damage and did damage the plaintiff. That would be what used to be called an action upon the case, a claim for damages in an action of that class which lawyers call actions of tort. If that is the position with regard to such an action against an agent for damages, it seems to me that an action quia timet by a plaintiff in respect of future apprehended damage would be an action for an injunction restraining the commission of an act which if committed would be a tort and therefore, within the meaning of s. 12, an action for a tort.

In my opinion that is the short answer to this claim, and I cannot entertain this action and must give judgment for the defendant.

Judgment for defendant.

Solicitors for plaintiff: *Crossman, Prichard, Crossman & Block, for Hedley & Thompson, Sunderland.*

Solicitors for defendant: *Collyer-Bristow & Co.*

J. H. W.

1916
Feb. 8.

LOUGHER AND OTHERS *v.* MOLYNEUX.

[1915 L. 679.]

Friendly Society—Loan to Member—Excess of Statutory Limit—Express Prohibition—Transaction illegal and void—Friendly Societies Act, 1896 (59 & 60 *Vict. c.* 25), *ss.* 46, 84, 89.

The Friendly Societies Act, 1896, by s. 46 (*c*) provides that a registered society "shall not make any loan" to a member exceeding 50*l.*, and (s. 84) makes it an offence to do "anything forbidden by this Act" subject to a penalty of 50*l.* (s. 89). Therefore a loan exceeding 50*l.* by a registered society to a member is an illegal and void transaction and the money cannot be recovered.

In re Coltman (1881) 19 Ch. D. 64 distinguished.

ACTION tried before Low J. without a jury.

The plaintiffs, as the trustees of a registered friendly society, claimed 130*l.*, the balance due upon a joint and several promissory note for 200*l.* made by the defendant and two others. One of the other makers of the note was a member of the society, and the note was given by him, and by the defendant and the other maker as sureties, to secure the repayment of a loan of 200*l.* by the society to the member out of their loan fund. The member also deposited a policy of insurance on his own life as further security for the loan. The defendant set up the defence that the transaction, being a loan of a sum exceeding 50*l.* to a member, was in contravention of the provisions of the Friendly Societies Act, 1896 (1), and the

(1) 59 & 60 Vict. c. 25, s. 44: "(1.) The trustees of a registered society or branch may, with the consent of the committee or of a majority of the members present and entitled to a vote in general meeting, invest the funds of the society or branch, or any part thereof, to any amount in any of the following ways: . . . .

"(*e*) upon any other security expressly directed by the rules of the society or branch, not being personal security, except as in this Act authorised with respect to loans."

Sect. 46: "A registered society may, out of any separate loan fund to be formed by contributions or deposits of its members, make loans to members on their personal security, with or without sureties, as may be provided by the rules, subject to the following restrictions: . . . .

"(*c*) A society shall not make any loan to a member on personal security beyond the amount fixed by the

rules (1) of the society and illegal, and that consequently the money could not be recovered.

Rayner Goddard, for the defendant. This was a loan by the society to a member within s. 46 of the Friendly Societies Act, 1896, and therefore, being for more than 50*l.*, was a transaction expressly prohibited; and further, such a transaction is by s. 84 (*b*) made an offence under the Act and the society is liable to a fine of 5*l.* by s. 89. This loan was made under rule 17 and contravenes its provisions. The transaction, therefore, was illegal and void and the money lent cannot be recovered either from the principal or the surety: *Victorian Daylesford Syndicate* v. *Dott* (2); *Bonnard* v. *Dott* (3); *Fergusson* v. *Norman* (4); *Bensley* v. *Bignold* (5); *Cope* v. *Rowlands*. (6) The decision in *In re Coltman* (7) does not affect this case. That was the case of a loan to a person who was not a member and was an investment within s. 16 of the earlier Act of 1875, corresponding to s. 44 of the present Act; and the decision of the Court of Appeal was that

rules, or make any loan which, together with any money owing by a member to the society, exceeds 50*l.*"

Sect. 84: "It shall be an offence under this Act if— . . . .

"(*b*) a registered society or branch or an officer or member thereof wilfully neglects or refuses to do any act or to furnish any information required for the purposes of this Act by the chief or other registrar or by any other person authorised under this Act, or does anything forbidden by this Act."

Sect. 89: "A society or branch, and an officer or member of a society or branch, or other person guilty of an offence under this Act for which a fine is not expressly provided shall be liable to a fine of not more than 5*l.*"

(1) The Rules of the Society. Rule 17 (Loans): ". . . . The committee shall not at any time make any loans out of moneys contributed for any other purposes than the loan fund. No member shall be capable of holding any interest in the loan fund exceeding 200*l.* The committee shall not make any loan to a member on personal security beyond 50*l.*, nor any loan which, together with any moneys for the time being owing by a member of the society, shall exceed 50*l.* The society shall not receive any deposits from its members other than the weekly contributions hereinbefore provided for."

(2) [1905] 2 Ch. 624; [1906] 1 Ch. 747, n.

(3) [1906] 1 Ch. 740.

(4) (1838) 5 Bing. N. C. 76.

(5) (1822) 5 B. & Al. 335.

(6) (1836) 2 M. & W. 149.

(7) 19 Ch. D. 64.

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the transaction was not prohibited by s. 44, but was only unauthorized and was consequently not illegal and void.

Lincoln Reed, for the plaintiffs. On the facts this ought to be treated as a loan by way of investment within s. 44 of the Act and rule 4; it was not a loan upon personal security only, but was further secured by the deposit of the policy of life insurance; and it did not exceed the limit of 200*l.* imposed by rule 4. The decision in *In re Coltman* (1) therefore governs this case. Assuming that this was a transaction within s. 46, yet the society did not commit an offence within s. 84; the words "anything forbidden by this Act" must be read as applying only to matters ejusdem generis with those specifically mentioned, and cannot then apply to s. 46. If such a transaction as this is not made an offence and subject to a penalty it is not illegal and void.

Rayner Goddard replied.

Low J. This is an action by the trustees of a registered friendly society against the defendant, who as a surety was one of the makers of a joint and several promissory note. The claim is to recover the balance due upon the note. The defence set up is that the transaction was one which is prohibited by statute under a penalty and was altogether illegal and therefore the contract cannot be enforced. The alleged illegality arises in this way: By s. 46 (*c*) of the Friendly Societies Act, 1896, it is enacted that [the learned judge read the section]; and under ss. 84 and 89 the penalty for doing anything forbidden by the Act is 5*l.* The material evidence is all documentary. There are two rules regulating the investment of the society's funds. Rule 4 deals with investment of the surplus funds; and rule 17 provides for loans to members. There can be no doubt that this was a transaction under rule 17 and not under rule 4; and it was a loan far exceeding the statutable limit of 50*l.* for loans to members.

It is contended for the defendant that, if the society lends more than 50*l.* to a member, it commits an offence under the statute and that therefore such a loan is irrecoverable. The authorities cited for that contention cover much ground. In *Fergusson* v. *Norman* (2) it was held that a pawnbroker who did not comply with the provisions of the statute 39 & 40 Geo. 3, c. 99, s. 6, acquired no property

(1) 19 Ch. D. 64. (2) 5 Bing. N. C. 76.

in the article pledged and could not retain it; then in *Bensley* v. *Bignold* (1) it was decided that a printer could not recover the cost of printing any work if he had not affixed his name to it pursuant to the statute 39 Geo. 3, c. 79, s. 27; and in *Cope* v. *Rowlands* (2) an unlicensed stockbroker was held not to be entitled to recover his commission or any reward for his work and labour. The cases, however, most relied on are more recent and arose under the Money-lenders Act, 1900—*Victorian Daylesford Syndicate* v. *Dott* (3) and *Bonnard* v. *Dott.* (4) In those cases it was decided that a money-lender who had not complied with the regulations of the Act as to registration could not recover money which he had lent, nor retain securities given for the loan, because the transaction was illegal and void. In the earlier case Buckley J. said (5): "The next question is whether the Act is so expressed that the contract is prohibited so as to be rendered illegal. There is no question that a contract which is prohibited, whether expressly or by implication, by a statute is illegal and cannot be enforced. I have to see whether the contract is in this case prohibited expressly or by implication"; and he decided that the contract in that case could not be enforced.

Now, I have to apply those doctrines to the present case. It is said that I ought not to decide against the plaintiffs because the defence is not meritorious; but I have nothing to do with that. Giving the best consideration I can to the authorities cited and to the able arguments on either side, I am unable to see anything in this transaction to take it out of the operation of the principles established by the authorities to which I have referred. In this case the lending of more than 50*l.* to a member is expressly prohibited. The prohibition is clear and express, and, though perhaps it is strengthened by the addition of a penalty, I cannot see how even if there were no penalty the plaintiff could in the face of the authorities recover money lent in direct contravention of the statutory prohibition. The only authority which could be relied on at all for the plaintiffs was *In re Coltman.* (6) There the transaction was within s. 16 of the Friendly Societies Act, 1875, corresponding with s. 44

(1) 5 B. & Al. 335.
(2) 2 M. & W. 149.
(3) [1905] 2 Ch. 624; [1906] 1 Ch. 747, n.
(4) [1906] 1 Ch. 740.
(5) [1905] 2 Ch. 629.
(6) 19 Ch. D. 64.

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Low J.

of the present Act. That was a merely enabling section containing nothing in the nature of a prohibition. If this transaction had been within s. 44 of the present Act no difficulty would have arisen; but it is within s. 46, and therefore that case does not apply. There must be judgment for the defendant.

Judgment for defendant.

Solicitors for plaintiffs: *Rawson & Stevens, for W. H. Davies, Cardiff.*

Solicitors for defendant: *J. T. Lewis & Woods, for William Thomas, Cardiff.*

J. H. W.

1915

Dec. 3, 6, 13.

ANDREW WEIR & CO. *v.* DOBELL & CO.

Charterparty—Sub-charter—Breach of by Sub-charterer—Measure of Damages—Duty of Plaintiffs to minimize Loss—Right to take into Consideration the Fact that Plaintiffs entitled to cancel their own Charterparty.

The owners of a ship chartered her to the plaintiffs for a particular voyage under a charterparty which stipulated for freight at the rate of 21*s.* per ton, and provided that in a certain event (which happened) the plaintiffs should be at liberty to cancel the charterparty. The plaintiffs sub-chartered the ship to the defendants for the same voyage at a freight of 28*s.* 6*d.* per ton. The defendants, in breach of their contract, refused to load. The rate of freight obtainable in the market for a similar ship at the date of the breach had fallen to 17*s.* per ton:—

Held, that as the contract related to the hire of a specific ship which the plaintiffs were entitled to get rid of at a saving to themselves of 21*s.* per ton, the measure of damages was the difference between 28*s.* 6*d.* and 21*s.*, and not the difference between 28*s.* 6*d.* and 17*s.*, the market rate.

TRIAL of action before Rowlatt J. without a jury.

By a contract of charterparty the owners of the sailing vessel *Kensington* chartered her to the plaintiffs, Andrew Weir & Co., to carry a cargo of coals to a port in Chile, and, having discharged her cargo, to load a cargo of nitrate of soda and proceed therewith to a port in the United Kingdom or on the Continent. The charterparty provided that freight should be payable at the rate of 21*s.* per ton,

and that "should the vessel not be ready for stiffening before the 15th September, 1913, charterers' agents to have the option of cancelling this charterparty."

By a sub-charter dated May 2, 1913, it was agreed between the plaintiffs as chartered owners and the defendants as sub-charterers that the ship *Kensington* should proceed to Pisagua and, after delivery of her outward cargo for the owners' benefit, should load a cargo of nitrate of soda and proceed therewith to a safe port in the United Kingdom or on the Continent as ordered and deliver the same on being paid freight at the rate of 28*s.* 6*d.* per ton. It was thereby further provided "Sufficient nitrate for stiffening to be supplied when required by master," and that "Should the vessel not have arrived at Pisagua and be ready to load on or before the 15th December, 1913, charterers or their agents to have the option of cancelling this charterparty."

The *Kensington* did not arrive at Pisagua till December 3. She proceeded to discharge her coal cargo, and the master was only in a position to ask for stiffening on December 11. The defendants insisted that it was impossible then for the ship to load the necessary stiffening and to discharge the remainder of the coal in time to be ready for loading the nitrate by December 15. They accordingly refused to supply the stiffening and cancelled the charterparty. The plaintiffs thereupon cancelled their contract with the owners, as they were entitled to do, the ship not having been ready to receive stiffening before September 15. The plaintiffs claimed that at the date when the stiffening was refused by the defendants it was not impossible to load it and to discharge the remainder of the coal in time, and that the defendants had committed a breach of the charterparty in refusing to load. The market value of freight at the date of the alleged breach was 17*s.* per ton, and the plaintiffs claimed as damages the difference between that sum and the 28*s.* 6*d.* per ton which they would have earned under the charterparty.

Leck, *K.C.*, and *Jowitt*, for the plaintiffs. In an action for breach of a contract of sale of goods the measure of damages is the difference between the contract price and the market price at the date of the breach, independently of any circumstances peculiar to the plaintiffs. "It is well settled that in an action for non-delivery or non-

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acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods": per Lord Esher M.R. in *Rodocanachi* v. *Milburn*. (1) That statement of the law was adopted by the House of Lords in *Williams Brothers* v. *Agius*. (2) The principle which is applicable to a sale of goods must equally be applicable to a sale of the carrying power of a ship. From that point of view the fact that the plaintiffs themselves held the ship as charterers under a contract with third persons becomes immaterial, and the terms of that contract cannot be taken into consideration. The market price of freight at the date of the breach must alone be looked at.

Greer, *K.C.*, and *A. R. Kennedy*, for the defendants. The subject-matter of the contract in the present case was a specific ship, and the principle applicable to a contract for the sale of unascertained goods has no application. The plaintiffs were bound to do what they could to minimize their loss, and as the ship did not arrive at Pisagua till long after September 15, and was not ready to take in stiffening by that date, they were entitled to cancel their contract with the owners and thereby to effect a saving to themselves of the 21*s.* per ton payable under that contract; and that right they in fact exercised. The measure of the plaintiffs' damages consequently is the difference between the contract freight of 28*s.* 6*d.* and the 21*s.* so saved, and not the difference between the contract freight and the market rate.

Cur. adv. vult.

Dec. 13. ROWLATT J. delivered a written judgment, in which, after finding that the defendants failed to prove the impossibility of the ship being ready to load the nitrate by the contract date, and that in refusing to load they had committed a breach of the contract, he proceeded as follows:—The only remaining question is as to the measure of damages. The freight under the charterparty was 28*s.* 6*d.* The market rate at the time of the breach was 17*s.* The plaintiffs, however, were not owners of the ship. They held her under a charter at 21*s.*, and that charterparty would come to an end

(1) (1886) 18 Q. B. D. 67, 77. (2) [1914] A. C. 510.

after the voyage for which they had rechartered her to the defendants. Further, the charterparty between the owners and the plaintiffs contained a cancelling clause, which, in the events that happened, entitled the plaintiffs at the time of the breach by the defendants to cancel and get rid of the ship; and that they did. As the plaintiffs only had the ship for this voyage, the giving of her up and thereby saving 21*s.* per ton was the same thing as finding a charterer for her at 21*s.* for that voyage, though if they had held her under a longer charter the effect of so surrendering her could not have been so measured. Under these circumstances the defendants say that the only damage suffered by the plaintiffs is the difference between 28*s.* 6*d.* and 21*s.*; whereas the plaintiffs say that it is 11*s.* 6*d.*, the difference between the freight that the defendants had contracted to pay and the market rate. It is to be observed that if that is right the plaintiffs would be entitled to put in their pockets 11*s.* 6*d.* as the result of the defendants' breach of contract, whereas if the contract had been fulfilled they would only have been entitled to 7*s.* 6*d.* per ton. It was said for the plaintiffs that the circumstance that they had a right to cancel their own charterparty was collateral and had no more effect upon the measure of damages than if the ship had been lost. In that case, however, the plaintiffs would merely have been delivered from an accrued loss by an independent circumstance accidentally supervening. The true position in the case before me is that the right of the plaintiffs to cancel, that is to say, to dispose of the ship for the 21*s.* thereby saved to themselves, was a circumstance essentially affecting the value of the specific thing which was thrown upon their hands, namely, the use of the ship for this voyage. They could either put her on the market and receive 17*s.* while paying 21*s.*, or save the 21*s.* and receive nothing. I think they were bound to choose the latter course, as they in fact did. It all turns, of course, on the circumstance that the plaintiffs' charterparty was coextensive with that of the defendants, otherwise they could not have dealt with the specific interest thrown on their hands, but only with a different and larger interest, at 21*s.* It was, however, urged that the case was covered by the authority of *Williams Brothers* v. *Agius*. (1) That, however, in the view that the House of Lords took of the facts, was simply a case of breach

(1) [1914] A. C. 510.

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of contract to deliver unascertained goods, the vendee having made a forward contract to deliver similar goods. In such a case the well-established rule, which the House of Lords were asked to disturb but would not, is that goods to be delivered under a contract of sale must be taken to be worth to the purchaser the market price of the day, and that the state of his own contracts is immaterial. I am of opinion, therefore, that the plaintiffs are entitled to recover damages at the rate of 7*s.* 6*d.* per ton.

Judgment for the plaintiffs accordingly.

Solicitors for plaintiffs: *Thomas Cooper & Co.*

Solicitors for defendants: *Pritchard, Englefield & Co., for Simpson, North, Hartley & Co., Liverpool.*

J. F. C.

1915
Dec. 7, 10.

MODERN TRANSPORT COMPANY, LIMITED *v.* DUNERIC STEAMSHIP COMPANY.

[1915 M. 2740.]

Ship—Time Charter—Restraint of Princes—Requisition by Admiralty—Claim for Hire.

A time charter provided that the owners should let and the charterers should hire a steamship for twelve months at a certain sum payable monthly for hire. The charter contained certain restrictions on the user of the ship and certain exceptions, by one of which restraint of princes was mutually excepted. The charterers were to have the option of sub-letting the ship. After the ship had been placed at the charterers' disposal the Admiralty by notices addressed first to the owners and then to the charterers requisitioned the ship for the service of the Government, and sent the owners a form of charterparty free from the restrictions of the time charter and specifying a monthly sum for hire less than that named in the time charter. The ship was then placed at the disposal of the Admiralty and was restored to the owners during the currency of the time charter:—

Held, that the owners were entitled to hire under the time charter notwithstanding the requisition of the ship by the Admiralty; and that the interest which was affected by the requisition was that of the charterers and not that of the owners.

TRIAL of action before Sankey J. without a jury.

The plaintiffs were the time charterers and the defendants were the owners of the steamship *Duneric*. The defendants having

asserted the right in the circumstances stated below to withdraw the vessel from the service of the plaintiffs, the latter claimed an injunction to restrain the defendants from so doing. The defendants contended that they were entitled to withdraw the vessel because of the plaintiffs' failure to pay the hire punctually, and they counter-claimed for a sum alleged to be due for hire. The plaintiffs replied that the hire claimed was for a period during which the *Duneric* was requisitioned and used by His Majesty's Government and that no hire was due.

The facts were as follows:—By a time charterparty dated March 2, 1915, made between the defendants as owners and the plaintiffs as charterers, it was agreed that the defendants should let and plaintiffs should hire the *Duneric* for a period of twelve calendar months from the date of being placed at the charterers' disposal, at a rate of 2350*l.* per calendar month, payable monthly in advance.

The several clauses of the charterparty material to the present case were as follows:—(1.) There was a clause limiting the cargo which the vessel was entitled to carry; she was forbidden to carry contraband of war. (2.) There was a clause limiting the voyages she might perform; she was only to be employed between safe ports of the United Kingdom and the Continent of Europe not east of Dieppe nor east of Sicily. (3.) There was a cesser clause prescribing the events upon which the hire should cease or be suspended. (4.) There was an exception clause under which the restraint of princes was mutually excepted. (5.) There was a clause giving the plaintiffs an option of sub-letting the steamer.

The vessel was duly placed at the plaintiffs' disposal on April 15, 1915. On May 21 the Admiralty, by a requisition notice of that date delivered to the defendants' agents, Messrs. Andrew Weir & Co., gave notice requisitioning the *Duneric* from the defendants for immediate use on Government service. A few days afterwards a form of Government charter was sent to Messrs. Andrew Weir & Co., which was completed by them, under which there was no such limitation, either as regards cargo or voyage, as there was in the time charter between the plaintiffs and defendants.

On May 26 Messrs. Andrew Weir & Co. informed the plaintiffs by a letter of that date that the Government had requisitioned the

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Duneric, and on June 11 the vessel was placed at the disposal of the Admiralty and was employed on Government business up till November 29, when the Government gave her up.

The sum which the Government paid for the use of the vessel was 1220*l.* 14*s.* monthly. As above pointed out, the monthly hire under the time charter between plaintiffs and defendants was 2350*l.*, a sum greatly in excess of the amount paid by the Government.

Considerable correspondence took place between the parties and their solicitors as to whether the Government had hired the vessel from the plaintiffs or from the defendants, and on June 4, 1915, the Admiralty agents sent to the plaintiffs a requisition similar to the one they had already sent to the defendants.

The plaintiffs argued in this correspondence that they were not liable to pay the hire during the time the vessel was used by the Government. The defendants argued the other way. Both parties being anxious to assist the authorities, the defendants agreed to collect the hire payable from time to time by the Government, and they wrote on June 10 saying "We still maintain the position we have taken up, but in order to carry out the wishes of the Admiralty and entirely without prejudice to our claim we have ordered the master to follow the instructions of the Admiralty."

On June 14 the defendants sent in their account for the third month's hire, which would have been due on the next day if nothing had happened in the meanwhile to alter the state of affairs.

Correspondence again ensued between the parties, the gist of which was that the plaintiffs refused to pay the hire and the defendants suggested arbitration. On July 9 the defendants nominated their arbitrator, and on July 15 the plaintiffs nominated theirs. On July 20, when another month's hire had, if the defendants' contention was correct, fallen due, Messrs. Andrew Weir & Co. wrote on behalf of the defendants: "We are in receipt of your letter of yesterday. The matter of the time charter hire, interest, &c., will be dealt with by the arbitrators." And on July 22 the plaintiffs' solicitors wrote that their clients had no objection to the Government paying the hire to the defendants pending the arbitration.

The arbitration proceedings were protracted, and the defendants from time to time sent in their account for hire. Before the next hire accrued due, namely, November 2, the Government wrote

informing the defendants that the *Duneric* would be discharged from His Majesty's service when clear of her cargo at Middlesbrough, and on November 30 the defendants passed that information on to the plaintiffs. No award had as yet been made in the arbitration.

On November 16 the defendants again wrote demanding the hire, and on November 17 the plaintiffs replied that they were content to leave the question of the responsibility for the difference between the Admiralty rate and their own time charter rate to the decision of the arbitrators or to the Courts. On the next day the defendants threatened to withdraw the steamer. She was not given up by the Government till November 29, but on November 25 the plaintiffs issued a writ claiming an injunction to restrain the defendants from withdrawing the *Duneric* from their service. December 2 was in fact the first day upon which the plaintiffs could have had the vessel, and upon that day they tendered a cheque for the hire, which was refused.

Roche, *K.C.*, and *R. A. Wright* (*Le Quesne* with them), for the plaintiffs.

MacKinnon, *K.C.*, and *Raeburn*, for the defendants.

Cur. adv. vult.

Dec. 10. SANKEY J. delivered a written judgment which, after stating the facts as above, proceeded as follows:—The first point which falls for my decision is whether the defendants are entitled to withdraw the *Duneric*, but as that is bound up with the question whether the plaintiffs are liable to pay the hire, I propose to discuss the latter question first. It was argued on behalf of the plaintiffs that the Proclamation of August 3, 1914, under which the Admiralty are entitled to requisition ships, is one which entitled them so to do from owners; that in this case the requisition was made upon the owners, who consequently were unable to allow the plaintiffs to have the use of the vessel; and thus there had been a total failure of the consideration, and no hire was due during the period the vessel had been employed by the Government.

It was further urged on their behalf that the Admiralty had requisitioned a larger interest than the plaintiffs had in the vessel, because there was no such limitation either with regard to cargo to

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be carried or voyages to be undertaken in the Admiralty charter as there was in the plaintiffs' time charter.

I do not think these contentions are sound. It appears to me (1.) that there is a special clause in the plaintiffs' time charter which provides for the circumstances upon the happening of which hire is to cease, and the events which have happened do not come within that clause; (2.) that there has been no failure of consideration. I think the true view is that the owners of the vessel granted the use of their ship subject to the restraint of princes. It will be observed that the exception clause, which is a mutual one, includes such events as perils of the seas as well as restraint of princes, and I do not think that if a vessel were delayed say for a fortnight either by perils of the sea or by a temporary embargo the hire would cease during such a period: see *Brown* v. *Turner, Brightman & Co.* (1) In fact there has been no failure of consideration. The consideration is a promise to give such use of the ship as the defendants are capable of giving subject to restraint of princes, and this the defendants have done.

In my view, therefore, the plaintiffs were liable to pay the hire to the defendants and were entitled to receive for themselves these sums paid by the Admiralty for the use of the vessel. In this case, as above pointed out, the hire paid by the Admiralty was very much less than the hire contracted to be paid by the plaintiffs. A somewhat similar case, where the sum paid by the Admiralty was very much more than the sum contracted to be paid by the charterers, has been decided by Atkin J. in *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (2), where that learned judge held that the charterers were bound to pay the hire contracted for and were entitled to receive the amount paid by the Admiralty.

Speaking generally, unless there are some special clauses in such a charterparty, the position is that the time charterer is entitled to the use of the ship during the period in question, and it is his use of the ship which the Admiralty puts an end to. Under these circumstances it would appear to be proper that he should pay the owners for what they have always been willing to give him and should himself receive from the Admiralty the fair compensation for the loss of the fruits of his bargain.

(1) [1912] A. C. 12. (2) [1915] 3 K. B. 668; affirmed [1916] 1 K. B. 485.

I now turn to the question whether the defendants were entitled to withdraw the ship. A clause in the charterparty gives them the right so to do if the hire is not paid punctually and regularly in advance. It was contended by the defendants that as the charterparty so stipulated, and as in fact the hire had not been so paid, it was incumbent upon the plaintiffs to show some agreement whereby they were excused from so paying the hire. The plaintiffs, on the other hand, contended that it was possible for the defendants either to waive the punctual payment of hire or to elect not to rely thereon. There are numerous cases to this effect, and one of the elements to be considered is the lapse of time which has taken place before an owner exercises or purports to exercise his right. I have already set out the facts on this point. I am satisfied that the defendants meant to refer to arbitration the question of the payment of hire during the whole time the ship was requisitioned by the Government. I remember how the arbitration had not been concluded when the defendants threatened to withdraw the vessel; also that she remained in Government service till November 29—in fact till after the issue of the writ in this case—and that she was not free for the plaintiffs till December 2, upon which date they tendered a cheque for the future hire.

I am of opinion, under the circumstances, that the defendants were not entitled to withdraw her and that the plaintiffs are entitled to an injunction as asked.

I cannot pass from this case without remarking that it is one of doubt and perplexity, and I am glad to hear that the opinion of higher tribunals is likely to be invoked. As far as this Court is concerned there must be judgment for the plaintiffs for the injunction asked for and judgment for the defendants for the balance of hire, 8627*l.* 0*s.* 9*d.*, in each case with costs.

Judgment for plaintiffs on the claim. Judgment for defendants on the counter-claim.

Solicitors for plaintiffs: *Downing, Handcock, Middleton & Lewis, for Bolam, Middleton & Co., Sunderland.*

Solicitors for defendants: *Holman, Birdwood & Co.*

W. H. G.

1916
Jan. 28.

TITMUS *v.* LITTLEWOOD.

Licensing Acts—Offences—Sale at Place not authorized by Licence—Agreement to Sell—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 65, *sub-ss.* 1, 2 ; *s.* 85.

By s. 65, sub-s. 1, of the Licensing (Consolidation) Act, 1910, a person shall not "sell" any intoxicating liquor at any place except that for which he holds a licence "for the sale" of that liquor, and by sub-s. 2 if he acts in contravention of the section he is made liable to penalties :—

Held, that the words "sell" and "sale" refer to a completed sale, and that a person who, on unlicensed premises, merely enters into an executory agreement for the sale of intoxicating liquor is not liable to the penalties imposed by the section.

CASE stated by justices for the county of Southampton.

An information was preferred by the respondent, Littlewood, against the appellant, Titmus, charging the appellant for that he on September 3, 1915, then being duly licensed to sell by retail intoxicating liquor in his house and premises, Victoria House, John's Road, Woolston, in the parish of Itchen, in the county of Southampton, unlawfully did sell by retail certain intoxicating liquor, to wit stout, at a certain other house known as 2, Eperney Villas, Station Road, Netley, in the parish of Hound, in the county of Southampton, where he was not then authorized by his licence to sell the same, contrary to the form of the statute in such case made and provided.

The appellant was and had been for some time the holder of a licence authorizing him to sell all intoxicating liquors to be consumed off his premises, Victoria House.

Before the coming into operation of the Order of the Central Control Board (Liquor Traffic) for the area of Southampton, dated July 22, 1915, and which came into operation at the expiration of ten days from the date thereof, and up to September 3, 1915, one Annie Wigginton, of 2, Eperney Villas, was and had been a customer of the appellant. On September 3, 1915, one Harrison, who was in the employ of the appellant, called at about 11.30 A.M. upon Annie Wigginton at 2, Eperney Villas, as he had been accustomed to do, and received from her an order on behalf of the appellant for four

quarts of oatmeal stout, and duly entered the same in a book kept by him for that purpose. Upon receipt of Annie Wigginton's order Harrison (in accordance with general instructions received from the appellant in consequence of the Order of the Board, and particularly of clause 8 thereof) asked for and received from her the sum of 2*s*. The appellant on the same day received Annie Wigginton's order and her 2*s*. from Harrison at Victoria House, and he appropriated the stout and labelled the bottles in execution of the order and duly despatched the stout to 2, Eperney Villas.

It was contended on behalf of the appellant that the above acts did not constitute a sale by retail of intoxicating liquor by him at 2, Eperney Villas, but on the contrary that the sale had taken place at Victoria House.

It was contended by the respondent that a sale by retail of intoxicating liquor by the appellant took place at 2, Eperney Villas.

By s. 65, sub-s. 1, of the Licensing (Consolidation) Act, 1910, it is enacted that, "Subject to the provisions of this Act, a person shall not sell or expose for sale by retail any intoxicating liquor unless he holds a justices' licence authorising him to hold an excise licence for the sale of that intoxicating liquor, nor at any place except that for which the justices' licence authorises him to hold an excise licence for the sale of that liquor."

By sub-s. 2, if any person acts in contravention of this section he is liable to penalties.

By s. 85, sub-s. 1, "In proving the sale . . . . of intoxicating liquor for the purpose of any proceeding relative to any offence under this Act, it shall not be necessary to show that any money actually passed . . . . if the Court hearing the case are satisfied that a transaction in the nature of a sale actually took place . . . ."

By clause 8 of the Order made by the Board, "No person shall (*a*) either by himself or by any servant or agent sell or supply in any licensed premises . . . . any intoxicating liquor to be consumed . . . . off the premises; or (*b*) consume any intoxicating liquor in or take it from such premises . . . . unless it is paid for before or at the time when it is supplied . . . ."

The justices convicted the appellant. The question for the opinion of the Court was whether the justices were right in point of law.

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Gordon Hewart, K.C., and *S. H. Emanuel*, for the appellant. The effect of the justices' decision is that clause 8 of the Order made by the Board has made unlawful that which was lawful before the Order. The appellant's traveller received the payment in compliance with the Order, which requires that the liquor must be paid for before or at the time it is supplied. That payment did not alter the character of the transaction. It was not a voluntary payment, but an act necessarily done in compliance with the Order. The sale took place at the appellant's licensed premises, not at the customer's house.

St. Gerrans, for the respondent. Although there was no sale at the customer's house within the principle of *Pletts* v. *Beattie* (1) and *Pletts* v. *Campbell* (2), inasmuch as the appropriation took place on the appellant's licensed premises, there was an executory contract entered into at the customer's house to sell the beer, and that contract is a sale within the meaning of s. 65 of the Licensing (Consolidation) Act, 1910. The case must be dealt with as if the appellant himself had gone to the customer's house. By s. 85 of the Act of 1910, in proving the sale of intoxicating liquor it is only necessary to show that "a transaction in the nature of a sale actually took place," and an agreement to sell is within those words. Dicta to that effect are to be found in the judgments in *Stephenson* v. *Rogers* (3) and *Strickland* v. *Whittaker*. (4) The intention of the Legislature was that the sale should physically take place on the licensed premises. In *Pletts* v. *Beattie* (1) it was not necessary to take the point that an executory contract is within s. 65 of the Act of 1910. [*Walker* v. *Walker* (5) was also referred to.]

LORD READING C.J. The question in this case is whether an executory agreement for sale of intoxicating liquor is a sale of that liquor within the meaning of s. 65 of the Licensing (Consolidation) Act, 1910. The order was received by the appellant's traveller, the money paid in advance to him, and the order booked by him at the customer's house—not on the licensed premises. It is not quite clear from the case stated by the justices whether they intended to hold as a fact that the traveller had authority to make and had

(1) [1896] 1 Q. B. 519.
(2) [1895] 2 Q. B. 229.
(3) (1899) 63 J. P. 230.
(4) (1904) 68 J. P. 235.
(5) (1903) 67 J. P. 452.

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completed an agreement for sale, or whether he merely received an offer which he was to transmit to his employer for acceptance or refusal as the employer thought fit; but I propose to deal with the case upon the footing that the traveller had authority to accept the order, and that consequently there was an agreement for sale at the time the traveller did the various acts to which I have referred. The Court must therefore deal with the case as if the appellant had gone in person to the customer's house and had received and booked the order and received the money. That would make an executory contract for sale, and not a sale. There was no delivery nor passing of the property, nor the other acts necessary to constitute a completed sale. The question, therefore, is one of principle and not unimportant.

In considering the numerous authorities which bear upon this point—and to which I will not refer to in detail—it is sufficient to say that in *Pletts* v. *Beattie* (1) and other analogous cases which have been decided since the Licensing Act, 1872, came into operation there has been very considerable discussion as to whether in the particular case before the Court the appropriation so as to constitute a sale took place at or away from the licensed premises, and the Court has always considered, apparently, that in determining where the sale took place it was important to determine among other elements where the appropriation took place. Now, if the argument for the respondent in the present case is correct, all that discussion was quite unnecessary, as it would have been sufficient for the Court to consider whether there was an agreement for sale made off the licensed premises, because if so there would have been an offence committed. Prima facie I find it very difficult to come to the conclusion that the judges who repeatedly had questions of this kind before them and counsel who argued them did not have in mind the point as to whether an executory agreement for sale was sufficient. It is quite true that in *Stephenson* v. *Rogers* (2)—a decision upon s. 37 of the Excise Act, 1860 (23 & 24 Vict. c. 113)—and in *Strickland* v. *Whittaker* (3)—which turned upon s. 3 of the Licensing Act, 1872—the Court apparently expressed a doubt as to whether an executory agreement for sale was not sufficient to satisfy those sections. In

(1) [1896] 1 Q. B. 519. (2) 63 J. P. 230, 231.
(3) 68 J. P. 235.

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Stephenson v. *Rogers* (1) Channell J. expressed the view—it was not necessary for the decision—that "selling might be satisfied by the making of an executory contract for the future sale, no property passing, but the making of . . . . a binding contract between the parties." That dictum came under review in *Strickland* v. *Whittaker* (2), in which Lord Alverstone C.J. and Wills J. both referred to the point but did not decide it, although Lord Alverstone C.J. was inclined to take the view that an executory agreement might constitute a sale. It cannot be said, nor is it suggested, that the point has ever been decided.

Although those dicta are worthy of the greatest consideration, I am much more impressed by the absence of any authority, since the passing of the Licensing Act, 1872, supporting a conviction where the contract has been executory. The fact that s. 65 of the Licensing (Consolidation) Act, 1910, only re-enacts, in substance, the words of s. 3 of the Licensing Act, 1872, is not in itself conclusive, although it is an element for consideration, but we must still determine the meaning of the words. The language of s. 85 of the Act of 1910, by which it is enacted that "in proving the sale . . . . it shall not be necessary to show that any money actually passed . . . . if the Court . . . . are satisfied that a transaction in the nature of a sale actually took place," causes a little difficulty because the words "in the nature of a sale" seem at first sight to indicate in their proper interpretation something less than a completed sale, which might well be an agreement for sale. But these words were used in s. 62 of the Licensing Act, 1872, and that statute repealed s. 18 of the Alehouse Act, 1828 (9 Geo. 4, c. 61), which contained the words "every person who shall sell, barter, exchange, or for valuable consideration otherwise dispose of . . . ." Those words lead to the conclusion that the words "in the nature of a sale" in s. 85 of the Act of 1910 refer to barter, or to a transaction where there is some equivalent other than money given in exchange for the liquor. That section therefore does not help the respondent. Sect. 65 of the Act of 1910 makes it an offence to "sell." We ought not to construe the word "sell" as meaning "an agreement for sale" unless there are other words in the statute which lead to that conclusion. In my judgment there are no such words. The word "sale" must

(1) 63 J. P. 230, 231. (2) 68 J. P. 235.

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therefore be construed in the legal sense of " sale " as distinguished from agreement for sale. I think that the reference in *Pletts* v. *Beattie* (1) and other cases to the legal niceties of a sale not being required for the purpose of constituting an offence under s. 65 of the Act of 1910 do not mean that an agreement for sale would be sufficient. In my judgment the Court was alluding more to the way in which it ought to deal with the facts in the case before it. Having regard to the number of cases in which the decision has turned upon the question whether there had been an appropriation, the conclusion is strengthened that an executory agreement for sale is not a sale within the meaning of the Act of 1910, and I so decide. The consequence follows that this conviction was wrong and must be quashed.

SANKEY J. I entirely agree. There is a very wide and well-known difference between a sale and an executory agreement for sale. The material words in s. 65 of the Licensing (Consolidation) Act, 1910, are " sell " and " sale." There is no definition of those words which would bring an executory contract for sale within the meaning of the section. In my judgment the words, which are plain, do not refer to an executory agreement for sale, but to an actual sale, and, as we are construing a section which provides a penalty, I do not think we ought to stretch its plain language so as to include a meaning which the words do not bear. For these reasons I agree with the judgment of the Lord Chief Justice.

LOW J. We are asked in the construction of s. 65 of the Licensing (Consolidation) Act, 1910—a highly penal section—to attribute to the word " sell " a wider meaning than the word bears in its natural interpretation, and that contention is supported by certain dicta. Is there a distinction between an agreement for sale and the act of selling ? If there is—and I think there can be no doubt that there is—then in order to convict under the section it is necessary to read into it something which is not there. It is not our duty to do that, and I therefore entirely agree with the other members of the Court, that a mere agreement to sell is not an offence against this section. It is to be remarked that in the Sale of Goods Act, 1893, it was

(1) [1896] 1 Q. B. 519.

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thought right to define a contract of sale and to make the definition expressly include a sale and an agreement for sale. If the contention set up to-day is sound, there was certainly no occasion to do that. In the Licensing (Consolidation) Act, 1910, there is no definition of "sale," and it therefore appears to me we must give to the word "sell" its ordinary meaning and not go out of our way to extend it.

Appeal allowed.

Solicitors for appellant: *Godden, Holme & Ward, for Lamport, Bassitt & Hiscock, Southampton.*

Solicitors for respondent: *Robins, Westlake & Dominy, Southampton.*

J. E. A.

K.B. D.
1916
Jan. 20.
C. A.
Feb. 9.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

THE KING *v.* HALLIDAY.

Defence of the Realm—Order in Council authorizing Internment of British Subject—Validity of—Defence of the Realm (Consolidation) Act, 1914 (5 *Geo.* 5, *c.* 8)—*Defence of the Realm (Consolidation) Regulations*, 1914, *reg.* 14B.

The making of reg. 14B of the Defence of the Realm (Consolidation) Regulations, 1914, which empowers the Secretary of State to order the internment of any person "of hostile origin or associations" even though he may be a naturalized British subject, was within the power of making regulations "for securing the public safety and the defence of the realm" conferred upon the King in Council by s. 1, sub-s. 1, of the Defence of the Realm (Consolidation) Act, 1914.

RULE for a writ of habeas corpus.

The applicant, Arthur Zadig, was born in Germany of German parents. In 1905 he became a naturalized British subject. On October 15, 1915, an Order was issued by the Secretary of State under reg. 14B of the Defence of the Realm (Consolidation) Regulations, 1914 (1), reciting that on the recommendation of a competent

(1) By reg. 14B of the Defence of the Realm (Consolidation) Regulations, 1914, "Where on the recommendation of a competent naval or military authority or of one of the advisory committees hereinafter mentioned it appears to the Secretary of State

military authority it appeared that for securing the public safety and the defence of the realm it was expedient that the applicant, in view of his hostile origin and associations, should be subjected to such obligations and restrictions as thereinafter mentioned, and ordering that he should be interned in a certain place of internment in Islington. The applicant having been interned under that Order obtained a rule addressed to Sir Frederick Halliday, the commandant of the said place of internment, calling on him to show cause why a writ of habeas corpus should not issue, upon the ground that reg. 14B, under which the internment Order was made, was ultra vires and not authorized by the Defence of the Realm (Consolidation) Act, 1914.

Sir F. E. Smith, *A.-G.*, and *Branson* showed cause. Hitherto, except in one case, the subjects of internment Orders have been alien enemies, and they, as being prisoners of war, have been interned under the authority of the Royal prerogative, so that it was unnecessary to consider the effect of the regulations. Here the person interned is a naturalized British subject, and the Order was made under reg. 14B. That regulation is authorized by s. 1, sub-s. 1, of the Defence of the Realm (Consolidation) Act (1), having been made "for securing the public safety and the defence of the realm." The Executive may be notified by their secret service agents that a particular person is about to carry out some plot against the public safety, but not be able to furnish such evidence as would be required

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that for securing the public safety or the defence of the realm it is expedient in view of the hostile origin or associations of any person that he shall be subjected to such obligations and restrictions as are hereinafter mentioned, the Secretary of State may by order require that person . . . . to be interned in such place as may be specified in the order."

(1) By s. 1, sub-s. 1, of the Defence of the Realm (Consolidation) Act, 1914, "His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty and Army Council and of the members of His Majesty's forces and other persons acting in his behalf; and may by such regulations authorise the trial by courts-martial, or in the case of minor offences by courts of summary jurisdiction, and punishment of persons committing offences against the regulations."

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in a Court of law. If the Executive are satisfied that the man is dangerous it is essential that in the emergency they should be allowed to intern him before he has acted. The effect of the wide general words at the beginning of sub-s. 1 as to the purposes for which regulations may be made is not in any way cut down by the later words dealing with the mode of trial. Those later words are intended to deal with persons who have committed offences against the regulations and who consequently have to be tried, whereas the earlier words are preventive only and deal with persons who have not yet committed any such offences, but are only suspected of being about to commit them, so that there is nothing to try them for. This question has already been raised before a Divisional Court in a case of *Rex* v. *Governor of Brixton Prison* (1), heard on December 21, 1915, where a natural-born British subject who had been interned under this regulation contended that it was ultra vires. But the Court, Ridley and Darling JJ., overruled the contention and refused a rule for a writ of habeas corpus.

Patrick Hastings, in support of the rule. It is not disputed that it is desirable that the Executive should have the power claimed, but it is contended that the statute has not given that power. It is a recognized rule that statutes which encroach on the rights of the subject should be interpreted, if possible, so as to respect such rights ; and when it is the intention of the Legislature to authorize such encroachment it must manifest that intention plainly, "if not in express words, at least by clear implication, and beyond reasonable doubt" : Maxwell on Statutes, 5th ed., p. 461. Here the intention to authorize the encroachment claimed is not sufficiently clearly expressed. It must be presumed that Parliament did not intend to authorize the imprisonment of a British subject without trial and without redress. If the wide words of the subsection be interpreted literally there would be no limits to the regulations that might be made. If the Crown's construction is right the Military Service Bills would be wholly unnecessary, for such service might be ordered by regulation.

LORD READING C.J. In this case Arthur Zadig, a naturalized British subject, who has been interned in pursuance of reg. 14B

(1) Not reported.

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of the Defence of the Realm Regulations, 1914, has applied to this Court for a writ of habeas corpus on the ground that that regulation is ultra vires and invalid, and the sole question before the Court is whether it was authorized by s. 1 of the Defence of the Realm (Consolidation) Act, 1914, under the powers of which it purports to have been made. It is said that the regulation, which seriously interferes with the subject, and particularly because the subject is liable to be imprisoned under it without trial, cannot be supported by the language of the section. Now what the section says is that "His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm," and it then goes on to add that he may make regulations "as to the powers and duties for that purpose of the Admiralty and Army Council and of the members of His Majesty's forces and other persons acting on his behalf, and may by such regulations authorise the trial by courts-martial, or in the case of minor offences by Courts of summary jurisdiction, and punishment of persons committing offences against the regulations." The Attorney-General has submitted on behalf of the Crown that the section is to be interpreted as if it had stopped at the words "for securing the public safety and the defence of the realm," and that the wide powers contained in those general words are not cut down by anything which follows. In my opinion that contention is right. The important matter to be noted is that the power is confined to the making of regulations during the continuance of the war. In the ordinary course in times of peace, if it had been intended to impose obligations or restrictions upon the subject they would have been submitted to Parliament in a Bill. But by reason of the emergency arising out of the war and the necessity of providing for the national safety without delay Parliament thought that the making of the necessary provisions for that purpose might be entrusted to His Majesty in Council. Our attention has been called to a case of *Rex* v. *Governor of Brixton Prison* (1), in which a similar question was raised before the Divisional Court. As we are taking the same view that the judges there took, it is unnecessary to refer to it further. I am of opinion that the rule must be discharged.

(1) Not reported.

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LAWRENCE J. I am of the same opinion. The words of the section seem to me clearly to authorize the making of this regulation. Sub-s. 1 has two objects, one preventive and the other punitive. It specially provides for the making of regulations to prevent persons communicating with the enemy and to prevent the spread of false reports likely to endanger the success of His Majesty's forces. It also provides for new modes of trial, that is to say by a court-martial or by a Court of summary jurisdiction, and the punishment, of persons who commit breaches of the regulations. Regulation 14B belongs to the former class—it is preventive only; the restriction of the party's liberty is not intended by way of punishment. I can see no ground for saying that it is ultra vires.

ROWLATT J. I am of the same opinion. The section confers upon His Majesty in Council power to issue regulations "for securing the public safety and the defence of the realm." Does this regulation come within the scope of those words? It seems to me perfectly obvious that the control of the movements of persons of hostile origin or associations, and, if necessary, the restriction of their liberty, is one of the most obvious measures which may have to be taken in time of war for the public safety. It is said that the words of the section must be read with a limitation because they are followed by particular provisions authorizing regulations as to special modes of trial and special punishments. But I can see nothing in those provisions to restrict the broad generality of the opening part of the section.

ATKIN J. The Defence of the Realm (Consolidation) Act, 1914, gave power to issue regulations for securing the public safety and the defence of the realm, and it seems to me well within the scope of such contemplated regulations that for the safety of the realm any person, whether a British subject or not, should be ordered to be kept in confinement, or what is ordinarily known as internment. That is the provision that has been made by the regulation in question, subject to this, that it allows of an internment order being made only where such a course is recommended by a competent naval or military authority or one of the advisory committees as being expedient in view of the person's hostile origin or associations.

I think that regulation is well within the powers given by s. 1 of the Act, and I can see no reason for invoking any limitations upon it. It appears to me that this is a mere question of prevention. I agree that the rule should be discharged.

LOW J. The very short question involved in this case is whether reg. 14B is a regulation for securing the public safety and the defence of the realm. Counsel for the applicant has not even suggested that it is not, and in my opinion there would have been no ground for such a contention if it had been raised.

Rule discharged.

J. F. C.

Zadig appealed.

Feb. 9. *Leslie Scott, K.C.* (*Patrick Hastings* with him), for the appellants.

The argument was substantially the same as that in the Divisional Court. The following authorities were cited:—*In re Petition of Right* (1); *Arthur* v. *Bokenham* (2); *Hawkins* v. *Gathercole* (3); *Battersby* v. *Kirk.* (4)]

Sir F. E. Smith, K.C., and *Branson*, for the respondent, were not called upon.

SWINFEN EADY L.J. This is an appeal by Zadig from an order of the Divisional Court discharging a rule nisi for a writ of habeas corpus. The point raised is a short one. Zadig is a person of hostile origin, having been born in Germany of German parents, but has since become a naturalized British subject. At present he is interned, and his complaint is that he is wrongfully interned, not in the sense that the regulations do not authorize his internment, but that the regulation itself is ultra vires and is of no binding force and effect. The regulation was made under the provisions of 5 Geo. 5, c. 8, s. 1, sub-s. 1, which declares that "His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of

(1) [1915] 3 K. B. 649.
(2) (1706) 11 Mod. 148, 150.
(3) (1854) 6 D. M. & G. 1.
(4) (1836) 2 Bing. N. C. 584.

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the realm"; and the order under which Zadig was interned, after reciting that on the recommendation of a competent military authority it appeared that for securing the public safety and the defence of the realm it was expedient that the applicant, in view of his hostile origin and associations, should be subjected to such obligations and restrictions as thereinafter mentioned, ordered that he should be interned in a certain place of internment in Islington. The regulation made by His Majesty in Council contains this proviso, that "any such order shall, in the case of any person who is not a subject of a State at war with His Majesty, include express provision for the due consideration by one of such advisory committees of any representations he may make against the order." So that a person who is interned under the regulation is entitled to make representations against the order of internment and to have them duly considered by one of the advisory committees, presided over by a person holding or who has held high judicial office. Zadig complains that the regulation was beyond the power of His Majesty in Council to make, and that notwithstanding the wide language of the statute it was ultra vires.

The statute in question is the third of a series of statutes dealing with the defence of the realm, each of them conferring wider powers than the preceding ones. The first of them, 4 & 5 Geo. 5, c. 29, was passed on August 8, 1914, immediately after the outbreak of war, and by s. 1 it was provided that "His Majesty in Council has power during the continuance of the present war to issue regulations as to the powers and duties of the Admiralty and Army Council, and of the members of His Majesty's forces, and other persons acting in his behalf, for securing the public safety and the defence of the realm." By a later Act (c. 63) passed on August 28 the power to make regulations was enlarged in three respects. By the present Act, 5 Geo. 5, c. 8, the powers conferred on His Majesty in Council are further extended. The statute contemplates regulations for preventing or securing various matters. Then it provides for punishment in these terms: "and may by such regulations authorise the trial by courts-martial, or in the case of minor offences by courts of summary jurisdiction, and punishment of persons committing offences against the regulations"; so that the provision is first preventive and then punitive. The Order in

Council is a regulation for securing the safety of the realm, and is within the wide language of the statute. In my judgment the regulation is clearly and in terms authorized by the express language of the statute; Parliament has indeed expressed its intention with irresistible clearness. If it be asked what are the regulations the power to make which is vested in His Majesty in Council, the answer is that the only limitations are that they must be made during the continuance of the war and for securing the public safety and the defence of the realm. Although that is the meaning, and the obvious meaning, of the statute, the appellant says that by reason of the wide general language employed some limitation must be imposed upon that meaning, and he contended that the liberty of the subject ought only to be affected by express language, and reference was made to the practice of Parliament in critical periods of English history not to legalize beforehand what might be done by the Executive, but to pass a subsequent Act of indemnity. But Parliament is entitled to depart from its own practice, and in recent times it has frequently adopted the method of passing an Act in general terms, the details of which are left to be filled in by a Government department. It is said that the general words of the statute ought not to be construed so as to take away the rights of the subject. But in the present case the language of the statute is free from ambiguity and no assistance is to be obtained from any such rule. It must be borne in mind that the regulation now under consideration, so far as it relates to the present appellant, is a regulation dealing, not with British-born subjects, but with persons of hostile origin, whom, in the opinion of a Secretary of State, it is necessary to subject to certain restrictions, for securing the public safety or the defence of the realm. It was further urged that subsequent parliamentary exposition prevented the construction contended for by the Crown, and reference was made to three subsequent statutes. These do not in my opinion assist the appellant. The first was 5 Geo. 5, c. 34, which restored to British subjects the right of trial by jury in cases where they were alleged to be guilty of an offence against any regulations made under that Act. The second was 5 Geo. 5, c. 37. The former statute, 5 Geo. 5, c. 8, contains a provision whereby it is made lawful for the Admiralty or the Army

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Council to require to be placed at their disposal workshops or factories in which arms or munitions of war are manufactured, and c. 37 extends this provision to any factory or workshop of whatever sort. The third statute was 5 Geo. 5, c. 42, which gave His Majesty in Council certain powers of control over the liquor trade for the purpose of the successful prosecution of the present war, and also power to issue regulations under the Defence of the Realm Act dealing with the State control of the liquor trade in certain areas and confirmed any such regulations made before the passing of the Act, which were merely declared to have been duly made in accordance with those powers. This parliamentary exposition shows what very wide powers the Defence of the Realm Acts were intended by Parliament to confer. In my opinion the appellant's argument fails: it is that, however dangerous a person of hostile origin may be, and however necessary it may be for the public safety that he should be interned, regulations providing for his internment cannot be issued by His Majesty in Council under the present statutes. The regulation which is impugned was in my judgment intra vires, and the appeal must be dismissed.

PICKFORD L.J. I agree, and have nothing to add.

BANKES L.J. I agree.

Appeal dismissed.

Solicitors for appellant: *Warren & Warren.*
Solicitor for respondent: *Solicitor to the Treasury.*

W. J. B.

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Ship—Bill of Lading—Construction—Exception of King's Enemies—Deviation—Ship sunk by German Submarine—Loss of Cargo—Liability of Shipowner.

When the route and ports of call of a line of steamships have become fixed, mere general words in a bill of lading giving liberty to call at intermediate ports will not justify calling at some entirely fresh intermediate port.

When a ship deviates and loss or damage to cargo carried by her occurs by act of the King's enemies, it is not open to her owners to set up the exception, whether it is contractual or implied by law. The exception applies only to a carrier who is performing his contract, not to one who is breaking it, unless he can show that the loss or damage must have occurred in any event.

Davis v. *Garrett* (1830) 6 Bing. 716 and *Lilley* v. *Doubleday* (1881) 7 Q. B. D. 510 followed.

The plaintiffs were indorsees and holders of two bills of lading under which wool was shipped at New Zealand in the defendants' steamship for carriage to London. Each bill of lading was upon the defendants' own form and bore upon its face the words "Direct service between New Zealand and London." Clause 1, which was in larger type than the exceptions and conditions, stated that the steamship was "now lying in the port of Napier, N.Z., and bound for London," and, after giving the fullest liberty to proceed to and stay at any ports or places in New Zealand for any purpose and to call at Monte Video or La Plata for certain specified purposes, continued: "with liberty on the way to London to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal, or other supplies." The clause further provided that the goods were "to be delivered subject to all the above liberties to deviate and to the exceptions and conditions at foot hereof." The bill of lading contained seventeen clauses in smaller type amongst them being an exception clause, which included the acts of the King's enemies, and by clause 3 the defendants were at liberty to carry the goods by other steamers (either belonging to themselves or to other persons) proceeding by any route, and whether directly or indirectly to London, and to tranship them.

The steamer followed the usual track from New Zealand to Ushant, but then proceeded towards Havre to land some goods not belonging to the plaintiffs, and was making for that port when she was torpedoed and sunk with her cargo by a German submarine. The usual ports of call of the defendants' line of steamships (of which Havre was not one) were well known, and the plaintiffs'

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bills of lading did not give liberty to call at Havre. A letter written by the defendants to their agent in New Zealand contained the passage "there is a distinct risk in deviating from our ordinary route without specific provision being made for it in the bill of lading." There was no greater probability of danger in going to Havre than to London.

In an action by the plaintiffs to recover the value of their goods from the defendants :—

Held, (1.) that clauses 1 and 3 must be read together and meant that if the goods were transhipped or carried in a steamer not belonging to the defendants they must have the liberties reserved by clause 3 ; (2.) that if clauses 1 and 3 must be read separately, the bill of lading became ambiguous and the defendants could not rely upon it as giving the ship liberty to deviate ; (3.) upon the assumption that Havre was an intermediate port within the meaning of clause 1, that clause did not give liberty to call there, as it was not one of the defendants' usual ports of call ; (4.) that as there had been a wrongful deviation, the defendants could not rely upon the exception of the King's enemies contained in the bills of lading or implied by common law ; (5.) that as the proximate cause of the loss was brought into operation by the default of the defendants, who were claiming the benefit of an exception, they were liable for the value of the goods although the plaintiffs had not shown that the natural and probable result of the deviation was that the vessel would be torpedoed.

ACTION tried in the Commercial Court before Bailhache J. without a jury.

The action was brought to recover the sum of 4013*l.* 19*s.* 7*d.*, the agreed value of 158 bales of dumped greasy wool shipped at Napier, New Zealand, in the defendants' steamship *Tokomaru* for carriage to London under two bills of lading. The facts are summarized in the head-note and set forth in detail in the judgment of the learned judge.

F. D. MacKinnon, *K.C.*, and *R. A. Wright*, for the plaintiffs. Notwithstanding the provisions of the bill of lading, there was, according to the authorities, an unjustifiable deviation from the agreed voyage, the deviation to Havre not being substantially in the ordinary course of a voyage from New Zealand to London : *Leduc & Co.* v. *Ward* (1) ; *Glynn* v. *Margetson & Co.* (2) If this was an unjustifiable deviation, then all the exceptions from liability, whether expressed or implied at common law, disappear, and the

(1) (1888) 20 Q. B. D. 475. (2) [1893] A. C. 351.

liability of the shipowner is that of a common carrier, but without even the protection which a common carrier has at common law in the case of loss caused by the act of God or by the King's enemies; in fact the shipowner then becomes an insurer: *Davis* v. *Garrett* (1); *Lilley* v. *Doubleday* (2); *Nugent* v. *Smith* (3); *Balian & Sons* v. *Joly Victoria & Co.* (4); *The Dunbeth* (5); *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (6); *The Europa* (7); *Internationale Guano en Superphosphaatwerken* v. *Macandrew & Co.* (8); *Kish* v. *Taylor & Sons.* (9)

If this loss was caused by the King's enemies, that loss is one of the expressly agreed exceptions, and, the express contract being void ab initio owing to the unjustifiable deviation, the shipowner cannot rely upon any implied exception to the same effect as the expressed exception. [They also referred to *Parker* v. *James* (10) and *Scaramanga & Co.* v. *Stamp.* (11)]

Sir R. B. Finlay, K.C., *Maurice Hill, K.C.*, and *W. N. Raeburn*, for the defendants. The voyage from New Zealand to London is very long, and the deflection from London to Havre is comparatively small and does not amount to a deviation. The liberty to call at intermediate ports means any Channel ports, including Havre and the French Channel ports. The letter from the defendants to their agent in New Zealand was only written out of precaution and ought not to affect the decision of the Court. The question is one of degree.

But, assuming that there has been a deviation, the question arises as to what the position of the shipowner is. He is not guilty of conversion or of trespass to the goods. The effect is simply to deprive him of the benefit of any exceptions in the bill of lading. He becomes a common carrier and is therefore entitled to the exceptions from liability at common law, which include the King's enemies. He is liable in damages for breach of contract, but only for the direct and natural consequence of the deviation. He would only be liable for the act of the King's enemies if he had thrown the ship directly in their path. In the present case the risk would

(1) 6 Bing. 716.
(2) 7 Q. B. D. 510.
(3) (1876) 1 C. P. D. 423, 436.
(4) (1890) 6 Times L. R. 345.
(5) [1897] P. 133.
(6) [1907] 1 K. B. 243, 660.
(7) [1908] P. 84.
(8) [1909] 2 K. B. 360.
(9) [1912] A. C. 604, 618.
(10) (1814) 4 Camp. 112.
(11) (1879) 4 C. P. D. 316; (1880) 5 C. P. D. 295.

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have been equally great if the *Tokomaru* had gone on the direct voyage to London. A common carrier by land who turned aside from his direct journey would only be liable if it could be shown with reasonable probability that a loss had been occasioned by the detour. *Lilley* v. *Doubleday* (1) was the case of a warehouseman and the decision is wrong. A warehouseman is only liable for negligence, which the plaintiff must make out. *Nugent* v. *Smith* (2) is remote from the present case. In *Lilley* v. *Doubleday* (1) the goods were removed from warehouse A, where they were insured, to warehouse B, where they became uninsured, and the removal was therefore the direct cause of the loss. The proposition that the effect of deviation is merely that the shipowner loses the benefit of the exceptions in the bill of lading and is thrown back to his rights and liabilities at common law is also supported by *Leduc & Co.* v. *Ward* (3) and *Balian & Co.* v. *Joly Victoria & Co.* (4) The expression of Gorell Barnes J. in *The Dunbeth* (5), "practically . . . . insurers," means insurers in the sense that common carriers are spoken of as insurers, i.e., they are not liable for the act of God or the King's enemies. In *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (6) Fletcher Moulton L.J. said: "The cases shew that, for a long series of years, the Courts have held that a deviation is such a serious matter, and changes the character of the contemplated voyage so essentially, that a shipowner who has been guilty of a deviation cannot be considered as having performed his part of the bill of lading contract, but something fundamentally different, and therefore he cannot claim the benefit of stipulations in his favour contained in the bill of lading. . . . . The most favourable position which he can claim to occupy is that he has carried the goods as a common carrier for the agreed freight. I do not say that in all circumstances he would be entitled as of right to be treated even as favourably as this, but in the present case the plaintiffs do not contest his right to stand in that position." In *Internationale Guano en Superphosphaatwerken* v. *Macandrew & Co.* (7) Pickford J. said: "The plaintiffs contended that the effect

(1) 7 Q. B. D. 510.
(2) 1 C. P. D. 423.
(3) 20 Q. B. D. 475.
(4) 6 Times L. R. 345.
(5) [1897] P. 133, 135.
(6) [1907] 1 K. B. 660, 669.
(7) [1909] 2 K. B. 360, 365.

of" the decision in *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (1) "was to support their contention that a deviation put an end to the contract between the parties by way of charter from the beginning of the voyage, no matter when or where the deviation took place. . . . . The conclusion I have come to is that it does decide that where there is a deviation the special contract by charterparty ceases to exist. . . . . It was suggested by one of the learned judges in the case of *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (1) that" the defendants "might have been in a less favourable position than even common carriers, but his Lordship did not point out in what way. I do not think for the purposes of this case that they can be in a worse position than that of common carriers."

The meaning of the clause giving liberty to call at intermediate ports in the bill of lading is intermediate ports at which the defendants' vessels do not usually call. If, therefore, Havre is not included as one of those unaccustomed ports, the clause would have no meaning. The Channel ports are nearest to the sea track from New Zealand to London.

There is no ambiguity in the bill of lading, and therefore *Elderslie Steamship Co.* v. *Borthwick* (2) does not apply. [Angell on Carriers was also referred to.]

MacKinnon, K.C., in reply was called upon only as to the effect of deviation upon the liability of the defendants. The clause "with liberty . . . . to call . . . . at any intermediate . . . . ports" is a common form in bills of lading and means any customary intermediate ports as understood by business men: *Glynn* v. *Margetson & Co.* (3) Sect. 46, sub-s. 2 (*b*), of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), shows that where the usual and customary course of the voyage is departed from there is a deviation. The sub-section reproduces the effect of decisions of long standing. If a ship is bound from A to B she cannot call at any other port without being given liberty to do so. Whether Havre was out of the usual course is a question of fact, and the letter of the defendants to their agent in New Zealand saying that there was a distinct risk in deviation from their ordinary route unless specific provision was made in the bill of lading is conclusive against them. By the

(1) [1907] 1 K. B. 660. (2) [1905] A. C. 93.
(3) [1893] A. C. 351.

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deviation the defendants became absolute insurers of the goods. They lost the benefit of the exception of the King's enemies both under the bill of lading and at common law. [*Beatson* v. *Haworth* (1) was also referred to.]

Cur. adv. vult.

Feb. 11. BAILHACHE J. read the following judgment:—The defendants' steamship *Tokomaru*, bound from New Zealand to London with a valuable cargo on board, was making for the port of Havre on January 30, 1915. She was within seven or eight miles of the coast and some twelve or thirteen miles from Havre, when at about 9 o'clock in the morning she was torpedoed by the German submarine *U* 21 and sank with her cargo. Amongst the cargo were 158 bales of greasy wool belonging to the plaintiffs, who held two bills of lading covering this shipment at Napier in New Zealand. Both bills of lading are in the same form and both are dated November 19, 1914. The agreed value of the wool is 4013*l.* 19*s.* 7*d.*, and the plaintiffs sue the defendants for this sum upon the simple and, as they allege, sufficient ground that the wool was lost while the *Tokomaru* was deviating from her voyage to London.

The defendants deny that there was any deviation. They assert that the *Tokomaru* was intending to call at Havre to discharge a parcel of frozen meat, and that her so doing was within the liberties reserved to them by the bills of lading held by the plaintiffs. Alternatively, and while admitting that deviation destroys the bill of lading exceptions, they say that they were common carriers with the common law exceptions of act of God and the King's enemies and that they are thus protected, and they further say that the deviation was not the cause of the loss. It is between these conflicting contentions that I have to decide.

The facts of the case are that the *Tokomaru* was one of the defendants' well-known line of steamships running from New Zealand to London. She loads, as do the other boats of this line, on the berth in New Zealand at different ports there, not always in the same order. As the shippers load their goods they receive their bills of lading. After the plaintiffs' goods had been shipped and their bills of lading

(1) (1796) 6 T. R. 531.

handed over, the defendants on or shortly before November 30, 1914, took on board a parcel of frozen meat from Messrs. Fletcher, Limited, for carriage, as it turned out, to Havre. The negotiations for this parcel began in London in October and about the same time in New Zealand, and several cables and letters passed between the defendants and their agent, Mr. Findlay, of Wellington, on the subject. Bordeaux and Marseilles were both spoken of as ports of discharge, but Havre was finally arranged, and the master had instructions at Teneriffe to proceed to Havre to discharge the meat before coming to London. In accepting this meat for discharge at a French port the defendants were embarrassed by the fact that they had already issued bills of lading in their usual form to the earlier shippers, including the plaintiffs. They might have protected themselves from all difficulties with regard to cargo loaded after the meat by an appropriate clause added to the later bills of lading, but they were unfortunately under the impression that Bordeaux would be the port of discharge, and so they added a clause to the later bills of lading giving express liberty to call at Bordeaux. This, of course, to say the least of it, made things no better. The defendants' uneasiness is expressed with such knowledge of the position and with such lucidity in their letter to Mr. Findlay of January 8, 1915, that I cannot do better than read it: " 'Bordeaux.' It appears that this port is not so convenient for discharging meat as Havre and Vesteys have asked us to give delivery of the *Tokomaru* meat at Havre instead of at Bordeaux. On looking into the matter we conclude that we are not free to do so under the bill of lading without running a risk of claims from the consignees of the other cargo should anything happen to the vessel. Our only chance was in the possibility that you had claused the bills in an open way for French ports and not for Bordeaux exclusively, but your reply to our cabled inquiry as to this precludes any hope of assistance in that direction. There remains only the alternative of insuring the risk of going to Havre under orders from the Government. The latter is not available and the former would have cost 10*s.* per cent., and this on a cargo worth a quarter of a million pounds is more than we could afford to pay. The consignees however may elect to pay this themselves which will settle the matter and incidentally will show what magnificent profits the meat which cannot

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afford to pay an increased rate of freight is bringing to the shipper. Our experience in regard to this matter led us to ask you to clause all bills of lading of any steamer likely to call at any port outside of an ordinary course 'with liberty to call at any French port or ports.' You will doubtless understand that although our bills of lading give full permission to wander about on the New Zealand coast and although the clauses otherwise seem fairly full there is a distinct risk in deviating from our ordinary route without specific provision being made for it in the bill of lading."

It is obvious from this letter that the defendants feared and were inclined to think that calling at Havre would be a deviation from the voyage to which they had committed themselves both by their earlier and later bills of lading; that there was possibility of damage, and, if so, claims would result which they would be ill equipped to meet. Havre is not one of their usual ports of call. I gather that no boat of this line bound from New Zealand to London had ever called there before. Their ports of call were well known, and after leaving one or more named ports on the South American coast they proceed to the Canary Islands, where they call either at Teneriffe or Madeira, and thence proceed direct to London, except in the case of their mail steamships, which I understand call at Plymouth to land passengers and mails for London. This has always been their practice, nor were they able to call any one to prove that Havre is a usual port of call for any steamship bound from New Zealand to London. After making Ushant the courses for London and Havre are the same until shortly after passing the Casquets, when the course for London goes straight ahead till off Dover, and the course for Havre sharply deflects to the eastward at an angle from the London course of approximately forty-five degrees. The distance to Havre from the point where the two courses diverge is about a hundred miles. On leaving Havre the London course is picked up again off Dover. The actual difference in distance between proceeding from Ushant direct to London and proceeding to Havre and thence to London is some fifty-eight miles. The defendants proved that submarines had not been active before January 30, 1915. Down to that date they had only sunk three ships. The master of the *Tokomaru* had received no warning that any danger was to be anticipated in calling

at Havre, and there was no greater likelihood of danger in going there than in going to London.

The question which lies at the root of the case is whether calling at Havre was within the liberties reserved to the defendants by the bills of lading held by the plaintiffs; only so can the making for Havre be justified. To answer this question I must examine the bill of lading. It is the defendants' own form. It bears upon it the words "Direct service between New Zealand and London." The first portion, which is in larger type than the exceptions and conditions clauses, states that the *Tokomaru* is now lying in the port of Napier and is bound for London. It gives the fullest liberty to load at ports or places in New Zealand in any order and for any purpose, and continues: "and bound (subject to the before mentioned liberties) on finally leaving New Zealand for London, and with liberty on the way to London to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal or other supplies, with permission, if desired, for the vessel to call at Rio de Janeiro and/or Monte Video and/or La Plata." I will call this clause 1. There are seventeen other clauses in small print. The only material ones are an exception clause, which includes the King's enemies, and clause 3, which reads thus: "The owners are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers, ship or ships, either belonging to themselves or to other persons, proceeding by any route, and whether directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination, and to tranship or land and store the goods either on shore or afloat and reship and forward the same at the owners' expense but at merchants' risk."

It was suggested for the defendants that whatever may be the effect of clause 1 there can be no doubt that clause 3 gave them liberty to call at Havre. I cannot accept this suggestion. As a mere matter of construction, if clause 3 stood alone it might be held to apply to the *Tokomaru*, but I have to look at the bill of lading as a whole and to read clauses 1 and 3 together, and so reading them I think the true result is that the shipowners are in fact saying to the shippers "If we carry your goods by the *Tokomaru* we will carry them upon the terms of clause 1, but we may have to tranship

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and possibly into a steamer not belonging to us; in that case we must have greater latitude and must have the liberties reserved by clause 3." If this is not so we get a situation very similar to that in *Elderslie Steamship Co.* v. *Borthwick* (1) and the bill of lading becomes an ambiguous document which will not assist the defendants. It is instructive to compare the bill of lading in this case with that in the case of *Hadji Ali Akbar & Sons* v. *Anglo-Arabian Steamship Co.* (2), in which the decision was the other way.

A more formidable point was taken by the defendants based upon clause 1. Sir Robert Finlay strongly insisted that the words "and with liberty on the way to London to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal or other supplies" fully justified a call at Havre to discharge the frozen meat. Havre, he said, is clearly an intermediate port. If I were asked as a mere matter of geography whether Havre was an intermediate port between New Zealand and London I might be inclined to say yes. If I was at the same time shown a chart with the respective courses from Ushant to London and from Ushant to Havre laid out upon it I should hesitate and doubt and be inclined to say no. It seems to me a question of degree. Any port which can be reached directly by diverging from the course to London and which is not north of London is, in a sense, an intermediate port between New Zealand and London—say, for example, Lisbon or Bordeaux. No port, however near the course, can be entered without some divergence. It is not very helpful to say that a port is intermediate which can be reached by divergence, is not north of London, and not too far from the direct route to London. What is too far? About that opinions in a given case must differ, and if it should hereafter be thought necessary to decide the point as a mere question of geography I leave it to wiser heads than mine. The question, in truth, seems to me one in which the question of geography is only one element, and I will assume, without so deciding, that Havre is geographically an intermediate port.

The real question is, were the defendants entitled to call there under the terms of their bill of lading? In deciding this question I must bear in mind that deviation has always been looked upon as a

(1) [1905] A. C. 93. (2) (1906) 11 Com. Cas. 219.

grave breach of contract. It entails upon the shipowner the displacement of his contract of carriage. It avoids the cargo owner's policy as and from the point of deviation unless, as is now sometimes the case, the rigour of the law is mitigated by apt words added to the policy. It causes what, in these days, every shipowner wishes to avoid, delay in delivery—a delay not measured by the actual extra distance covered, but also by the time occupied in entering and leaving port and loading or discharging cargo. It is further to be borne in mind that in the course of a series of years the route taken and the ports called at by a particular line become fixed and are well known to shippers and to underwriters. The defendants have themselves by their conduct put their own construction upon clause 1 of the bill of lading. Teneriffe and Madeira are their intermediate ports. Underwriters therefore in insuring cargo by the defendants' line from New Zealand to London are writing what they understand to be a well-defined risk, a matter of importance both to shippers and underwriters and one into which it is undesirable to introduce an element of uncertainty. Lastly, "liberty to call at intermediate ports" has become common form in bills of lading and has come to mean very little. I am of opinion that the fears expressed by the defendants in their letter of incurring liability to claims if they called at Havre and cargo was damaged were well founded. In my judgment the *Tokomaru* was not justified, to quote their own words, "in deviating from our ordinary route without specific provision being made for it in the bill of lading." That sentence exactly expresses my view. In my judgment, when the route and ports of call of a line of steamships have become stereotyped, mere general words in their own bill of lading giving liberty to call at intermediate ports will not justify their calling at some entirely fresh intermediate port. The truth is the defendants were tempted by a high rate of freight to run risks which they recognized as possible but regarded as improbable. Unfortunately the improbable happened.

The remaining points may be dealt with briefly. The effect of deviation is to displace the contract of carriage during and after deviation, and, if Pickford J. is right, ab initio—see his judgment in *Internationale Guano en Superphosphaatwerken* v. *Macandrew & Co.* (1) From the point of deviation, at any rate, the shipowner

(1) [1909] 2 K. B. 360.

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becomes at best a common carrier. The defendants say that he is a common carrier with the common law exceptions of act of God and King's enemies in his favour. Let me assume that, of what use are those exceptions to the defendants in this case? As I understand it the law stands thus. When a ship deviates and loss of or damage to cargo occurs, either by act of God or, as here, by the King's enemies, it is not open to her owners to set up either exception. Those exceptions apply and apply only to a carrier who is performing his contract, and never to a carrier who is breaking it, unless he can show that the loss or damage must have occurred in any event: see *Davis* v. *Garrett* (1) and *Lilley* v. *Doubleday*. (2) That he can obviously never do in such a case as the present. The most that can be said is that the *Tokomaru* might have been torpedoed if she had continued on her course to London, and that avails the defendants nothing. The only case that occurs to me as likely to arise in practice in which a shipowner can hope to escape liability for damage to or loss of goods during or after deviation is when the goods perish from inherent vice and would have so perished without deviation: see for example *Internationale Guano en Superphosphaatwerken* v. *Macandrew & Co.* (3)

The defendants lastly say that the deviation was not the cause of the loss, and that the plaintiffs cannot recover because they cannot show that the natural and probable result of deviating to Havre was that the *Tokomaru* would be torpedoed. This seems to me rank heresy. A shipowner is an insurer of the goods he carries, subject, if there is a special contract, to the contractual exceptions, and subject, if there is no special contract, to the common law exceptions of act of God, the King's enemies, and inherent vice. If the goods are lost while in his ship it is not for the goods owner, in the first instance, to prove anything but the loss. The shipowner, if he denies liability, must then set up the particular exception upon which he relies and bring himself within it.

Here the exception is the King's enemies, but the defendants are in the difficulty pointed out by Lord Watson in *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (4), where he said: "When a shipowner . . . claims the benefit of the exception, the Court will, if necessary, go

(1) 6 Bing. 716.
(2) 7 Q. B. D. 510.
(3) [1909] 2 K. B. 360.
(4) (1887) 12 App. Cas. 518, 526.

behind the proximate cause of damage, for the purpose of ascertaining whether that cause was brought into operation by the negligent act or default of the shipowner or of those for whom he is responsible." This is equally true whether the exception be contractual or implied by law. Deviation leaves a shipowner defenceless in the face of such a loss as occurred in this case.

I have to add that throughout this judgment whenever I have spoken of " deviation " I must be taken to mean wrongful deviation.

My judgment is for the plaintiffs for 4013*l.* 19*s.* 7*d.* and costs.

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Judgment for plaintiffs.

Solicitors for plaintiffs : *Parker, Garrett & Co.*

Solicitors for defendants : *Ince, Colt, Ince & Roscoe.*

J. E. A.

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Feb. 14.

County Court Jurisdiction—District in which Defendant " carries on his Business "—Defendant a Director of a Company carrying on Business in the District—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 74.

By s. 74 of the County Courts Act, 1888, " Every action or matter may be commenced in the Court within the district of which the defendant . . . . shall dwell or carry on his business " :—

Held, that for that purpose the business of a joint-stock company is not the business of its directors ; and that the mere fact that such a company carries on business within the district of a particular county court does not render a director of the company liable to be sued in that county court in respect of a cause of action arising outside the district.

APPEAL from the county court of Staffordshire holden at Walsall.

The action was commenced in the Walsall County Court to recover money due upon a betting transaction which took place at Bolton in Lancashire. The defendant, who resided at Colwyn Bay, was a director and shareholder of a company called Butler, Limited, which carried on business and had its registered office at Walsall. In his capacity as director he attended a board meeting of the company at Walsall once a month. It was suggested, although there was no evidence before the county court judge to that effect, that the defendant and his brother were the only two directors of Butler, Limited,

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and that the business was substantially the defendant's business. The defendant appeared in the action under protest and objected to the Court's jurisdiction on the ground that he did not "dwell or carry on his business" within the district of the Court within the meaning of s. 74 of the County Courts Act, 1888. The judge held that as the company of which the defendant was a director carried on business in the district that was sufficient to satisfy the section; he accordingly proceeded to hear the action and gave judgment for the plaintiff for the amount claimed. The defendant appealed.

R. McCleary, for the defendant. The defendant did not carry on *his* business at Walsall; the business of a company is not the business of its directors.

[SANKEY J. If a man has a successful business and turns it into a limited company, is it not his business that is being carried on at the company's office?]

No, not even if he owns all the shares: *Gramophone and Typewriter, Ld.* v. *Stanley*. (1) A company is a legal entity quite distinct from its shareholders or directors.

[LUSH J. Is not the position of a director of a company itself a business? In *Barron* v. *Potter* (2), where the question was what was the occupation of a grantor of a bill of sale, and it appeared that he was a qualified Baptist minister and also was a director of three or four companies, the Master of the Rolls spoke of the business conducted by him in connection with the companies as his business.]

It may be that a man who is on the boards of several companies may make a business of being a director of companies, and that, if he conducts the business of all those companies from his own office, he may be said to carry on his business there; and that was the condition of things to which Lord Cozens-Hardy was referring. But a man can hardly be said to make a business of being a director of a single company, and there was no evidence that the defendant was a director of any other company.

Cecil Hayes, for the plaintiff. In order to give the county court jurisdiction by reason of the defendant carrying on his business within the district it is enough if he carries on the business of his

(1) [1908] 2 K. B. 89. (2) [1915] 3 K. B. 593.

employers there ; it is not necessary that he should be a principal. In *Ex parte Breull* (1) it was held that a debtor who was employed as a clerk in a bank, the office of which was within the district of the London Bankruptcy Court, was "carrying on business" in the district within the meaning of the Bankruptcy Rules, 1870, and that that Court had jurisdiction to grant a debtor's summons against him. No distinction can be drawn between the expression "carrying on business" and "carrying on his business." James L.J. said : "His business in life is that of a bank clerk, and it is not the less his business because he receives a fixed salary for it." Moreover, from the fact of the name of the company here being the same as that of the defendant, and that he and the brother were said to be the only directors, the presumption is that it was a family company and that the business was in reality largely his.

LUSH J. This case is one of some little importance. Sect. 74 of the County Courts Act, 1888, says that "Except when by this Act it is otherwise provided, every action or matter may be commenced in the Court within the district of which the defendant . . . . shall dwell or carry on his business." The plaintiff commenced this action in the Walsall County Court. The defendant appeared under protest, alleging that he neither resided nor carried on his business in the district. As the jurisdiction was disputed the burden lay on the plaintiff to prove that one or other of those conditions was satisfied. The only evidence before the Court consisted of a statement made by the defendant and accepted by the plaintiff that the defendant lived at Colwyn Bay, that he was a director of a company, called Butler, Limited, which carried on business at Walsall, and that he attended the board meetings of that company once a month. The question is whether that was sufficient to justify the judge in holding that the defendant carried on his business in Walsall, and that the Court consequently had jurisdiction. I think it was not. It is true that in *Ex parte Breull* (2), where the question was whether a bank clerk "carried on business" at the bank of his employers within the meaning of the Bankruptcy Rules, it was held that, having regard to the purpose of those rules, he did ; that a man must be treated as

(1) (1880) 16 Ch. D. 484, 487. (2) 16 Ch. D. 484.

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carrying on business at the place where he is to be found during the business hours of the day, even though the business that he is then engaged in is not his own. But here the words are, not "carry on business," but "carry on *his* business." If the mere fact of a man being a director of a company and attending the board meetings at the registered office of the company amounted to a carrying on by him of his business there, one who was a director of a number of different companies having their head office each in a different town would carry on his business in all those towns and might at the option of the plaintiff be sued in any one of them. That cannot have been intended. I think that what the County Courts Act meant was that a man who is carrying on a business of his own is usually to be found at the place where it is carried on. Whereas a director of a company may not go near the company's place of business more than two or three times in the year. It is not necessary here to decide whether a director could not be sued in the district in which his company's business was carried on if it were shown that the company was a private one and that he held all the shares. There is no evidence here that that was the case.

SANKEY J. I agree. There was no evidence before the county court judge on which he could find that the defendant carried on his business at Walsall. The only evidence was that a company of which he was a director carried on business there, and that was no evidence that he carried on his business there. I desire to reserve the question whether a director of a one-man company in which he owned all the shares could be sued in the county court of the district in which the company carried on its business.

Appeal allowed.

Solicitor for plaintiff: *G. R. Cran, for Nicklin & Hawley, Walsall.*
Solicitors for defendant: *Boote & Dutton, Manchester.*

J. F. C.

HUGH STEVENSON & SONS, LIMITED *v.* AKTIEN-GESELLSCHAFT FÜR CARTONNAGEN-INDUSTRIE.

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Jan. 11 ;
Feb. 8.

[1915 H. 1561.]

Alien Enemy—Partner—Outbreak of War—Dissolution of Partnership—Legal Proceedings against Enemies Act, 1915 (5 *Geo.* 5, *c.* 36).

A partnership between a British subject and a German subject, the latter being resident in Germany, in a business carried on in England, the continuance of which during war between England and Germany would involve intercourse with the enemy, is dissolved by, and at the date of, the outbreak of war between those countries. The provisions of the Partnership Act, 1890, as to the winding up of a partnership are in that case inapplicable. The German partner is entitled to have his interest in the partnership at the date of the dissolution valued, including his share of the goodwill, if any, and to be paid the amount thereof when payment becomes legally possible ; and he has an equitable lien on the partnership assets for the amount due to him. If the English partner continues to carry on the business after the date of the commencement of the war the German partner is not entitled to a share of the profits of the business earned after that date.

Action tried before Atkin J. without a jury.

The plaintiffs were a company registered under the Companies Acts carrying on business at Manchester. The defendants were a company incorporated and carrying on business at Dresden in Germany. An agreement made between the parties on November 22, 1906, provided that the plaintiffs should be the sole agents for the sale in Great Britain and the British Colonies of a machine made by the defendants for the manufacture of metal edgings for cardboard and other boxes, and that the plaintiffs should manufacture the metal edgings in England in partnership with the defendants. The agreement was in force when the war between this country and Germany commenced on August 4, 1914. The action was brought under the Legal Proceedings against Enemies Act, 1915, and the plaintiffs claimed declarations (1.) that the contract dated November 22, 1906, was dissolved on August 4, 1914 ; (2.) that the agency constituted by the contract was terminated on August 4, 1914, and that the defendants were only entitled to such sum in respect thereof as was due to them by the plaintiffs on that date ;

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(3.) that the partnership constituted by the contract was dissolved on August 4, 1914, and that the defendants were only entitled to such sum as might be found due to them upon the taking of an account in the winding up of the partnership, upon the basis that it was terminated upon that date; (4.) as to the basis upon which the account was to be taken with regard to certain machinery on the plaintiffs' premises; and (5.) that the defendants were not entitled to any of the profits of the English factory after August 4, 1914.

Leslie Scott, K.C., and *Spear*, for the plaintiffs. The contract between the parties was terminated on the outbreak of war both as regards the agency and the partnership: *Griswold* v. *Waddington* (1); *Esposito* v. *Bowden* (2); *Zinc Corporation* v. *Hirsch.* (3) The plaintiffs are entitled to have the partnership account taken on the basis that the defendants' interest in the partnership terminated on August 4, 1914.

McCardie, for the defendants. In considering the question as to the effect of the outbreak of war on this partnership regard must be had to the provisions of the Trading with the Enemy Acts. In those Acts there is not only a recognition, but an assertion, of the proposition that war does not annul, but only suspends for the duration of the war, a partnership between a British subject and an alien enemy: see Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), s. 2, sub-s. 1, s. 3 (*b*); Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), s. 2, sub-ss. 1, 5, s. 3, sub-s. 2. This point was not brought to the attention of the Court in *Rex* v. *Kupfer.* (4) In *Rombach* v. *Rombach* (5) Eve J. appointed a receiver and manager of a partnership in which one party was a naturalized British subject and the others were alien enemies, and in *Rombach* v. *Gent* (6) the receiver brought an action for, and recovered, the price of goods sold by the partnership. Intercourse with the enemy partner must not take place during the war, but there is no reason why the alien partner should not after the termination of the war receive his share of the partnership profits earned during the war.

(1) (1819) 16 Johnson, Sup. Ct. New York, 438; Scott's Cases on International Law, 504.
(2) (1857) 7 E. & B. 763.
(3) Ante, p. 541.
(4) [1915] 2 K. B. 321.
(5) [1914] W. N. 423.
(6) (1915) 31 Times L. R. 492.

A private person has no right to confiscate, or impair the value of, property of an alien enemy which happens to be left in this country during the war, and it makes no difference whether the property is the sole property of the alien or belongs to him jointly with a partner who is a British subject. The only effect of war is to suspend the alien's remedies.

With regard to the agency, the essential consideration is whether the continuance of the agency will involve any intercourse with the enemy: see *Zinc Corporation* v. *Hirsch* (1), per Swinfen Eady L.J. It is not necessary for the carrying on of the plaintiffs' agency that they should have any intercourse during the war with the defendants. If the partnership is to be treated as dissolved as from August 4, 1914, the rights of the partners in the winding up are governed by the Partnership Act, 1890: see ss. 38, 39. As the plaintiffs have carried on the business without any final settlement of accounts, the defendants are entitled under s. 42 to a share of the profits. They are also entitled to a share of the goodwill: see Pollock's Digest of the Law of Partnership, 10th ed., pp. 119, 120.

Leslie Scott, *K.C.*, in reply. The winding-up provisions of the Partnership Act presuppose a state of affairs in which the relationship between the partners can continue as before the dissolution though confined to matters arising in the winding up, but if, as in the present case, that continuing state of affairs cannot exist, ss. 38, 39, and 42 have no application. It is not in accordance with English public policy that the property of an enemy left in this country at the outbreak of war should be more than protected; it would be wrong to give to the enemy any accretion in value which arose during the war, particularly where the accretion is due to the efforts of the English partner. Where the surviving partner continues to carry on the business the goodwill of the partnership has no value: *Trego* v. *Hunt*. (2)

Cur. adv. vult.

Feb. 8. ATKIN J. read the following judgment:—This is an action brought under the Legal Proceedings against Enemies Act, 1915, by the plaintiffs, who are a company registered under the Companies Acts carrying on business at Manchester, against the

(1) Ante, p. 556. (2) [1896] A. C. 7.

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defendants, who are a company incorporated and carrying on business in Germany, for declarations of rights under that Act in respect of a written contract made between the parties and dated November 22, 1906. The declarations asked for are that the agreement has been ended by the outbreak of war, and that a partnership regulated by some of the clauses of the agreement is dissolved, and declarations of consequential rights.

No relief other than a declaration is asked for, and it would appear that no other relief could be given, for on the whole I think the plain intention of the Act is to limit the relief which can be granted to some form of declaration of rights. The result appears to be that, though rights can be conclusively declared by the Court, the British subject must wait until the end of the war before the Court can enforce these rights, and then, apparently, he must proceed by a second action, and again serve his ex-enemy defendant, in order merely that the Court may make orders enforcing rights which it has already authoritatively ascertained and which it cannot alter. I find it difficult to understand the principle underlying this legislation, but my duty is to act upon it.

The agreement in question is dated November 22, 1906. It appears that the defendants had been the owners of certain patents for the manufacture of metal edgings used to fortify cardboard and other boxes, and of the machines by which the edgings are affixed to the boxes. The plaintiffs are manufacturers of cardboard boxes, and before November, 1906, had entered into arrangements with the defendants by which the plaintiffs undertook the agency in this country for the machines, and also manufactured in this country the metal edgings. The agreement in question superseded all former agreements, and provides, first, for the plaintiffs to become sole agents of the defendants for the sale of machines, and, secondly, that the plaintiffs should manufacture in England in partnership with the defendants the metal edgings. The agreement was made for five years terminating on December 31, 1911, and thereafter was to continue in force until determined by six months' notice given on or before June 30 in any succeeding year. This notice had not been given at the outbreak of war. I am satisfied that under this agreement a substantial business had been done in this country both under the agency and under the partnership. The plaintiffs

were the sole agents for the machines, and appear to have been the only people in fact manufacturing the edgings in this country. I am further satisfied that the business was of value to this country in war time, and that boxes strengthened by the goods sold in this business have been largely used for military and allied purposes.

It appears to me that the agreement was one which it became illegal to perform after the outbreak of war. It necessarily involved commercial intercourse with an enemy, and could not be fulfilled without such intercourse. I am not clear that it is covered by the express words of any of the Trading with the Enemy Acts or the Proclamations made thereunder, but the rules of the common law which are preserved by those Acts are sufficient to avoid the contract upon the outbreak of war. I need only refer to *Esposito* v. *Bowden* (1) and the recent decision of the Court of Appeal in *Zinc Corporation* v. *Hirsch*. (2) In respect of the agreement the plaintiffs are, I think, entitled to the first two declarations they claim in the prayer of the statement of claim, which read as follows: "(1.) A declaration that the contract in writing dated November 22, 1906, between plaintiffs and defendants set out in paragraph 2 hereof was dissolved on August 4, 1914. (2.) A declaration that the agency constituted by the said contract was terminated on the said August 4, and that defendants are only entitled to such sum in respect thereof as was due to them by plaintiffs on that date."

In respect of the partnership the plaintiffs ask for further and distinct declarations, namely, that the partnership is dissolved, and as to their rights on that footing. The defendants contend that as far as the partnership is concerned it was only suspended by the declaration of war, and they rely upon certain provisions of the Trading with the Enemy Acts in support of that contention. I think it would probably be sufficient in this case to say that the agency and the partnership constituted in that one agreement form integral parts of one arrangement, and that the decision I have already come to disposes of the partnership as well as the agency. But I do not rest my judgment on this ground, for I think it important to deal with the questions of principle argued before me. It appears to me that the legal effect of an outbreak of war upon a partnership between two persons, each residing in the respective

(1) 7 E. & B. 763. (2) Ante, p. 541.

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belligerent countries, is to dissolve the partnership. The relationship necessarily involves commercial intercourse in the closest degree, and such intercourse on the outbreak of war becomes illegal. Once such illegality has supervened, it seems impossible for the relationship to continue to exist so as to be capable of being revived after the war. I think the reasoning of Chancellor Kent in *Griswold* v. *Waddington* (1) is convincing on this point. The decision is approved in *Esposito* v. *Bowden* (2) and in *Zinc Corporation* v. *Hirsch.* (3) Indeed the question seems to be concluded by s. 34 of the Partnership Act, 1890, which provides that "a partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership." I was pressed by Mr. McCardie with the terms of the Trading with the Enemy Act, 1914, s. 2, sub-s. 1, and the Trading with the Enemy Amendment Act, 1914, s. 2, sub-ss. 1 and 5, and s. 3, sub-s. 2, so far as they refer to profits or partners, which, he submitted, indicated that the Legislature assumed that the partnership continued after the war and was not dissolved. It appears to me that the sections in question where dealing with partnerships probably contemplate only profits earned before the war of a business dissolved at the outbreak of war, but in any case do not impliedly repeal or overrule the existing law as to the fact of dissolution, or license partnerships with enemies to continue.

If, then, a partnership with an enemy is dissolved upon the outbreak of war, what on such a dissolution are the rights of the former partners? The defendants contended that the rights on dissolution are determined by the provisions of the Partnership Act, 1890. By s. 37, any partner may publicly notify the dissolution, and require any other partners to concur for that purpose in all necessary or proper acts. By s. 38, after the dissolution of a partnership the authority of each partner to bind the firm and the other rights and obligations of the partners continue so far as may be necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the time of the dissolution. By s. 39, any

(1) 16 Johnson, Sup. Ct. New York, 438; Scott's Cases on International Law, 504.

(2) 7 E. & B. 785.

(3) Ante, p. 559.

partner is entitled, as against the other partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets applied in payment of what may be due to the partners respectively, and for that purpose may apply to the Court to wind up the business and affairs of the firm. By s. 40, where one partner has paid a premium the Court may order the apportionment of the premium. By s. 42, where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner, then, in the absence of agreement, the outgoing partner is entitled at his option to have such share of the profits as the Court may find to be attributable to the use of his share of the partnership assets or to interest at 5 per cent. per annum. Are these provisions applicable to the case of dissolution by reason of war? It will be noted that ss. 37, 39, and 40 depend for their efficacy upon the possibility of invoking the assistance of the Court. For this purpose it is necessary to bring before the Court the enemy partner, a task which in war time presents almost insuperable difficulties. There is no special power of serving the enemy out of the jurisdiction; and the Act under which the present proceedings are brought, as I have already said, gives no power to make such orders as are necessary under those sections.

But, apart from the difficulty as to procedure, there are deeper considerations to be discussed. How are the provisions of these sections to be reconciled with the principle which prohibits trading with the enemy, and the reason at the root of that principle, which is that one of the objects of war is to damage the enemy's commerce while maintaining one's own? Sect. 38 provides for the continuance of the partnership relation, gives power to bind the enemy partner for liabilities necessary for winding up, and, conversely, appears to give authority to the enemy partner to bind his British partners for such purpose. Such provisions are subject to all the objections which are the foundation of the rule directing dissolution. Sect. 39 has also a far-reaching effect. If operative it would mean that upon a dissolution, in the absence of agreement which in itself would probably be void, every business in which any enemy had any

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partnership interest could only be carried on by the continuing British partners or partner under sufferance, on the footing that the enemy had a right to have the business wound up, and that the Court, if an action could be constituted before it with proper parties, would have to make such a decree. It appears to me impossible that the result of war is to give the enemy the right to have wound up, against the wish of the British partner, every British business in which the enemy was interested in time of peace. So to hold, in my judgment, would be to ignore the vast influences which war must exercise on commercial relations—to speak in terms of peace when there is no peace. This s. 39 is closely connected with s. 42, which appears to contain provisions of a quasi-penal character in cases where a business is continued in violation of a partner's right to have his share ascertained upon a dissolution. By s. 42, if the business instead of being wound up under s. 39 is continued, the enemy partner would have an option to take profits or interest on his share. In this case counsel for the defendants relied on this section, and stated that he elected to take profits. Is it conceivable that the law which requires a partnership to be dissolved on the outbreak of war on the ground that the continuance of the relationship is inconsistent with national interests yet permits the enemy to retain an interest in the successful issue of British commerce, with the result that in the case of a business benefited by war his profits may increase in proportion to the length or severity of the war? The words of Chancellor Kent in *Griswold* v. *Waddington* (1) are cogent: "The commercial business of each country, and of all its people, is an object of attack, and of destruction to the other. One party may be engaged in privateering, or in supplying the fleets and armies of his country with provisions, or with munitions of war; and can the law recognize the other partner as having a joint interest in the profits of such business? It would be impossible for the one partner to be concerned in any commercial business, which was not auxiliary to the resources and efforts of his country in a maritime war. And shall the other partner be lawfully drawing a revenue from such employment of capital, and such personal services directed against his own country? We cannot contemplate such a confusion of obligation

(1) 16 Johnson, Sup. Ct. New York, 489; Scott's Cases on International Law, 506.

between the law of partnership and the law of war, or such a conflict between his interest as a partner, and his duty as a patriot, without a mixture of astonishment and dread." The same reasoning as applies to profits appears to me to apply equally forcibly to any claim for interest. It appears to me equally anomalous that an enemy should be entitled to interest supposed to be earned in a British business during the war, whether the interest is sought either as damages for improper use or non-payment of the defendants' money, or on an implied contract to pay interest. It is not necessary to deal with the general question as to whether interest is abated during war time as between enemies, though much may be said for that proposition; but where interest is claimed on money alleged to have been left in a trading concern during the war, I think it would be quite inconsistent with the general principle to allow it. Consistently with the views I have expressed above, I see no circumstances under which an obligation, either express or implied, to pay interest would arise.

The difficulties created by these sections, both as to their effect on commerce generally and as to the machinery for carrying them out, satisfy me that they and the common law and equitable rules to which they gave statutory effect have no application to a dissolution effected by the outbreak of war, the effects of which must be governed by the special principles affecting commercial intercourse in that event. Enemy property in this country is not to be confiscated, but on the other hand the enemy is not to be given rights which after the outbreak of hostilities would tend to defeat one of the necessary objects of such hostilities, namely, to confound the enemy's commerce and to conserve our own. The enemy's interest in the partnership at the date of dissolution is that to which he is entitled. Such right is in normal times to have the debts of the partnership paid out of partnership assets, and the surplus, if any, distributed amongst the partners. For the reasons I have given above it seems to me impossible that he can insist on the business being terminated to secure this result, and I think that full effect can be given to his right of property by holding, as I do, that where his British partner desires to carry on the business, the enemy's right is to have his interest as above defined valued as of the date of the declaration of the war,

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and to be paid, when payment is legally possible, that amount. I think upon the partnership assets for the amount so ascertained he would, as an existing right of property, have an equitable lien. Subject to these rights it appears to me to follow that upon a declaration of war an enemy partner ceases any longer to be interested in the commercial adventure in this country whether as to assets, profits, or interest.

It is worth noting that the provisions of the various Trading with the Enemy Acts provide facilities for giving effect to the legal rights I have defined. Notice of enemy property has to be given to the custodian, and by the recent Act the Board of Trade can vest the interest of the late enemy partner in the custodian and clothe him with powers which will enable him to concur with the continuing partners in ascertaining the enemy's share and in providing for payment on the most suitable terms. Nothing that I have said is intended to affect any rights as between the continuing partners and the custodian of the enemy's property, except that the enemy property in which the custodian may be interested under the Act will consist of the rights as above defined. The custodian's powers in respect of such property and the right to payment will depend upon the provisions of the Acts, and I do not express any further opinion upon them.

What remains to be done is to apply the above principles to the declarations asked for in the statement of claim and counter-claim. The plaintiffs are entitled to declarations 1 and 2 as asked: "(1.) A declaration that the contract in writing dated November 22, 1906, between plaintiffs and defendants was dissolved on August 4, 1914. (2.) A declaration that the agency constituted by the said contract was terminated on August 4, 1914, and that defendants are only entitled to such sum in respect thereof as was due to them by plaintiffs on that date." Under 2 the plaintiffs agree that they will bring into account the proceeds of sales of agency goods subsequent to August 4. I see no objection to this, and the sum will be ascertained on that footing. The plaintiffs ask for further declarations as to the footing on which the defendants' interest is to be ascertained, and amongst other things ask that it should be declared that clause 12 of the agreement does not apply. That clause provides that on termination of the agreement the machinery for the

manufacture of clamps in Manchester should be received by the party making the highest offer for the same in a sealed offer. It appears to me that such a stipulation is inapplicable and unlawful in war time and should not be taken into account. A further point was raised as to whether the defendants were entitled to an interest in the goodwill, if any, as of the date of dissolution. I think that they were, but inasmuch as the business was carried on in the name of the plaintiffs, who are a limited company, and who would be entitled to carry on similar business in the same name, it is difficult to see that under the circumstances the goodwill would be of much value. Declaration 4 should run: "Declare that the partnership constituted by the said contract was dissolved on the said August 4; that the defendants are entitled to the value of their share in the said partnership including goodwill, if any, as of the date of August 4, 1914; that clause 12 of the agreement is not applicable; that the defendants are not entitled to any of the profits of the partnership since August 4, 1914."

The plaintiffs should have the costs of the action on claim and counter-claim.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Burn & Berridge.*

Solicitors for defendants: *Herbert Smith, Goss, King & Gregory.*

F. O. R.

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Feb. 7.

[RAILWAY AND CANAL COMMISSION.]

POSTMASTER-GENERAL *v.* HUTCHINGS.

Telegraph—Posts and Wires—Public Road—Consent of Body having Control of Road—Condition of Rental Payment by Postmaster-General—Release of Condition by Railway and Canal Commissioners—Telegraph Act, 1863 (26 & 27 *Vict. c.* 112), *s.* 12—*Telegraph Act*, 1868 (31 & 32 *Vict. c.* 110), *s.* 2—*Telegraph Act*, 1878 (41 & 42 *Vict. c.* 76), *ss.* 3, 4, 5—*Telegraph Act*, 1892 (55 & 56 *Vict. c.* 59), *s.* 3.

By s. 12 of the Telegraph Act, 1863, coupled with s. 2 of the Telegraph Act, 1868, the Postmaster-General "shall not place a telegraph over, along, or across . . . . a . . . . public road, or a post in or upon a . . . . public road, except with the consent of the body having the control of" the public road.

By ss. 3, 4, and 5 of the Telegraph Act, 1878, if the body or person entitled to give their consent to the Postmaster-General placing telegraphs and posts under, upon, or over a public road attach to it conditions to which the Postmaster-General objects, the difference is to be determined by (amongst other authorities) a county court judge, and, in case of dissatisfaction with his decision, by the Railway and Canal Commission.

The owner of the soil of roads which had been dedicated to the public but had not been taken over by the local authorities attached to his consent to certain telegraphic lines being placed under and over the roads a condition that the Postmaster-General should make a payment of a rent of 10*l.* a year so long as the telegraphic lines were maintained, and upon the Postmaster-General objecting to the condition a county court judge imposed a rent of 5*l.* a year. The parties being dissatisfied with the decision of the county court judge:—

Held by the Railway and Canal Commission, that the condition, being inconsistent with the true character and capacity of the person having the control of the public roads, ought not to have been imposed, and that the Postmaster-General was entitled to be relieved from the obligation to pay the rent.

Application by the Postmaster-General to the Railway and Canal Commission, under the Railway and Canal Traffic Acts, 1854 to 1894, and the Telegraph Acts, 1863 to 1913, to hear and determine a difference which had arisen between the applicant and the respondent.

The respondent was the freeholder of a building estate known as the Sutton estate, Seaford, and was the body (within the meaning of

the Telegraph Acts, 1863 to 1913 (1)) having power to give or withhold his consent to the placing by the applicant of telegraphic lines under or over the streets or public roads mentioned below on the estate. The estate was only partially developed, and was traversed by roads laid out fifteen or sixteen years ago, none of which had been taken over by the road authorities, but all had been dedicated to the use of the public. They had been used by the public for carriages and foot passengers. On December 2, 1914, the applicant served on the respondent a notice under s. 3 of the Telegraph Act, 1878 (2), requiring his consent to the placing of underground telegraphic lines, consisting of pipes and the wires and apparatus connected therewith, and overhead telegraphic lines, consisting in each case of a post and the wires and apparatus connected therewith, on certain of the roads respectively. The respondent would only give consent subject to the condition that the applicant paid a rental of 10*l.* per annum. The applicant objected to that condition, and applied, under s. 4 of the Telegraph Act, 1878, to the judge of the county court having jurisdiction within the district to determine the difference.

The number of posts proposed to be placed upon the roads was three. The original positions of two out of the three poles were at the respondent's request altered, and they were placed a few yards away from their original site.

By his award, dated July 12, 1915, the county court judge awarded that the applicant should be at liberty to place and maintain the underground and overhead telegraphic lines, subject to the condition that the applicant should pay to the respondent 5*l.* per annum so long as the telegraphic lines were so placed and maintained.

The applicant being dissatisfied with the award, so far as it imposed the condition of the payment of a sum per annum, gave notice to the respondent under s. 4 of the Telegraph Act, 1878, requiring the difference between the applicant and the respondent to be, and accordingly under s. 5 it was, referred to the Railway and Canal Commission. The applicant submitted that the award, so far as it imposed the condition, was unreasonable and unjust, and contended that the only condition which ought to be imposed was that the applicant should make good any damage actually occasioned

(1) See note (1) on p. 778, post. (2) See note (2) on p. 779, post.

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to the streets or public roads by the placing or maintenance of the telegraphic lines.

The respondent by his answer expressed dissatisfaction with the amount of the award and applied to the Court to increase it.

H. L. Murphy, for the applicant. The respondent does not dispute that he is the "body having the control of" the roads. The proposition is also clear from the decision in *Postmaster-General* v. *Hendon Urban Council*. (1) The roads have been dedicated to the public, but the respondent is the owner of the soil.

There is nothing, upon the facts, which makes the imposition of a rent just or reasonable. It was not the intention of the Legislature that any pecuniary condition should be imposed upon the Postmaster-General except to the extent of any damage done to a public road or where the posts are placed upon a commercial undertaking such as a railway. The interests of the respondent as owner of adjoining land ought not to be taken into consideration in this application. The Court will deal only with his interest in the public roads, as he is only entitled to raise any objection to the erection of the posts in his capacity of the body having control of the roads: *Postmaster-General* v. *London Corporation*. (2) The interests of adjoining owners are amply safeguarded by ss. 7, 23, 24, 27, and 30 of the Telegraph Act, 1863. There is no reported case in which a road authority has ever obtained a rent as a condition of its consent. [The definition of "street" and "public road" in s. 3 of the Telegraph Act, 1863, s. 3 of the Telegraph Act, 1892, and ss. 6 and 9 of the Telegraph Act, 1863, were also referred to.]

The Respondent in person. These are not public roads within the meaning of s. 3 of the Telegraph Act, 1863, and s. 3 of the Telegraph Act, 1892. I have been put to the expense of making the roads, and there is no reason why an annual payment should not be made to me as the owner of the soil of the roads who has borne that capital expense. The poles, unless of an ornamental kind in harmony with the estate, will render the roads unsightly. [He referred to s. 21, sub-s. 4, of the Telegraph Act, 1863.]

H. L. Murphy in reply. The applicant will see that proper provision is made against the roads being rendered unnecessarily

(1) [1914] 1 K. B. 564. (2) (1898) 78 L. T. 120.

unsightly. Sects. 17 and 18 of the Telegraph Act, 1863, compel "the company"—which term, by s. 2 of the Telegraph Act, 1868 (31 & 32 Vict. c. 110), includes the applicant—to keep the roads in repair for six months and to restore them to their original condition with all reasonable expenses, or the respondent is at liberty to do the work and charge the applicant with the cost.

LUSH J., having stated the facts, continued: The roads are clearly public and not merely private roads. Being public roads not taken over by the local authority, the respondent is still the owner of the soil, and is therefore a person who, within the meaning of the Telegraph Act, 1878, can give or withhold his consent to the Postmaster-General placing posts along the roads. We have to deal with the matter under s. 5 of the Telegraph Act, 1878, not by way of appeal from the learned county court judge, but by way of rehearing, and we have to exercise our judgment and discretion and to say whether and upon what terms the respondent ought to give his consent. It is quite clear that in dealing with this application we must regard the respondent not in his capacity of owner of the adjoining lands whose interest in the land may—I do not say it will—possibly be hereafter prejudicially affected by the construction of the poles. If the respondent should hereafter suffer any damage in his capacity of owner of the adjoining lands by the construction of the poles, there is a series of sections in the Telegraph Act, 1863, and subsequent statutes which provide in perfectly clear terms for his obtaining compensation in respect of his proprietary interest in the land being injuriously affected. The decision of this Court upon this application will not affect the respondent's interest as the owner of the adjoining lands or his right, whatever it is, under the statutes to object to the posts being there or to claim compensation for any damage done to him in his capacity of private owner of the lands.

We have only to deal with his capacity as owner of the soil of the roads that have been dedicated to the public. It is very unusual for a county court judge or other arbitrator to order in cases of this kind that a rental shall be paid to the owner of a street or public road for the erection of telegraph posts. I think I am right in saying that there is no case in which such an order has ever been made, and it

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appears to me to be inconsistent with the true character or capacity of the controller of the streets that he should be given a rental for that which does not affect his proprietary interest. There is no ground that I can see upon which it would be right—certainly in a case of this kind with which alone we are concerned—to impose the condition that the Postmaster-General should pay a rental to the owner of the soil in a public road—a rental which bears no possible relation to any damage done, but is in the nature of compensation for what one may call the use and occupation of property of a beneficial owner. In my view it is altogether wrong to impose any such condition. If the respondent could show that in his capacity of owner of the soil of the roads he would be put to expense and damage by reason of the construction of these posts it would be perfectly right and proper to see that provision was made to guard him against any such risk, but there is no such risk. The Postmaster-General will maintain the posts and make good all damage done in erecting and maintaining them, and therefore the respondent will suffer no pecuniary loss whatever by reason of the construction of the posts. It is quite right that the respondent should be—and he has been—heard upon any question as to the unsightliness of the posts, and provision has been made in order to prevent the roads being rendered unnecessarily unsightly.

I have come to the conclusion that the condition ought not to have been imposed by the learned county court judge, and that the Postmaster-General is entitled to be relieved from the obligation of paying the rental, and that consent ought to be given without it.

THE HON. A. E. GATHORNE-HARDY. I entirely agree and have nothing to add.

SIR JAMES WOODHOUSE. I also entirely agree.

Application granted.

Solicitor for applicant: *Solicitor to the Post Office.*

NOTE (1).—Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 3: "In this Act the term 'street' means a public way situate within a city, town, or village, or between lands continuously built upon on either side, and repaired at the public expense or at the expense of any turnpike or other public trust, or ratione tenurae, including the footpaths of such way . . . . ;

the term 'public road' means a public highway for carriages being repaired at the public expense, or at the expense of any turnpike or other public trust, or ratione tenurae, and not being a street, including the footpaths of such public highway . . . ."

Sect. 12: "The company shall not place a telegraph over, along, or across a street or public road, or a post in or upon a street or public road, except with the consent of the body having the control of such street or public road; . . . ."

By s. 2 of the Telegraph Act, 1868 (31 & 32 Vict. c. 110) (which empowered the Postmaster-General to acquire the undertakings of the telegraph companies), the term "the company" in the Telegraph Act, 1863, includes the Postmaster-General.

By s. 3 of the Telegraph Act, 1892 (55 & 56 Vict. c. 59), "the terms public road and street shall respectively include a public highway for carriages and a public way, although not repairable in manner in the Telegraph Act, 1863, mentioned . . . ."

NOTE (2).—Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 3: "Where any body or person (within the meaning of the Telegraph Act, 1863) having power under the said Act to give or withhold their consent to the Postmaster-General placing telegraphs and posts (within the meaning of the said Act) in, under, upon, along, over, or across a street or public road . . . . fail within twenty-one days after being required to do so by the Postmaster-General to give their consent, or attach to their consent any terms, conditions, or stipulations to which the Postmaster-General objects, or withdraw a consent, a difference shall be deemed to have arisen between the Postmaster-General and such body or person . . . . and that difference shall be determined in manner hereinafter provided, and the authority by whom the difference is to be determined may, if after hearing all parties concerned they think it just, give their consent either unconditionally or subject to such pecuniary or other terms, conditions, and stipulations as they may think just; and that consent shall for all purposes be of the same effect as if it were a consent given under the Telegraph Act, 1863, to the Postmaster-General by such body or person . . . ."

By s. 4 "such difference shall . . . . be referred to the . . . . judges of the county court having jurisdiction within the district in which the difference has arisen . . . ."

"Provided always, that in case either the Postmaster-General or the body or person between whom the difference has arisen shall be dissatisfied with the award or decision of such . . . . judge, ... the party so dissatisfied may within twenty-one days after such award or decision require, by a notice in writing given to the other party, that the difference shall be referred to the Railway Commissioners."

Sect. 5: "The differences so required to be referred by the last preceding section to the Railway Commissioners . . . . shall be referred to and shall be determined by the Railway Commissioners for the time being . . . ."

J. E. A.

C. A.
1916
Feb. 11.

[IN THE COURT OF APPEAL.]

In re YEATMAN.

Ex parte YEATMAN.

Bankruptcy—Trustee's Costs—Taxation—Reopening—Employment of Solicitor—Sanction of Committee of Inspection—Separate Authorities in respect of distinct Matters—Amount of Costs limited for each Matter—General Bill of Costs—Taxation without Reference to distinct Matters authorized—Annulment of Adjudication—Jurisdiction to reopen Taxation—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 22, 57, 73.

A receiving order was made on October 17, 1910, and adjudication followed on December 8, 1910. In the administration of the bankrupt's estate the official receiver, exercising the functions of a committee of inspection, sanctioned the employment by the trustee of a solicitor to transact several separate and distinct matters of business, in each case limiting the amount of costs to be incurred. The solicitor brought in his costs for taxation and lodged one general bill, not distinguishing the separate matters in respect of which his employment was authorized. In some instances the amount limited for costs was exceeded and in others not reached, but the total amount allowed on taxation did not exceed the aggregate amount authorized in respect of the whole of the matters for which the employment of the solicitor was sanctioned. The taxing Master issued his allocatur, and in 1913 the taxed costs were paid by the Board of Trade. In 1915, the bankrupt having provided for the payment of all his debts in full, the adjudication was, on his application, annulled. He then moved to reopen the taxation, on the ground that it had not been carried out in accordance with the Act, and that if each matter of business had been dealt with separately the total amount allowed on taxation would have been decreased :—

Held, on the authority of *In re Geiger* [1915] 1 K. B. 439, that there was jurisdiction at the instance of the former bankrupt to order the reopening of the taxation, and that this was a proper case for such an order.

Decision of Horridge J., ante, p. 461, reversed.

APPEAL from a decision of Horridge J. (1) dismissing an application by the bankrupt to reopen the taxation of the bill of costs of Mr. John Tucker, the solicitor to the trustee in the bankruptcy.

On October 17, 1910, a receiving order was made against the

(1) Ante, p. 461.

debtor, and on December 8, 1910, he was adjudicated a bankrupt. On November 6, 1911, the trustee was appointed without a committee of inspection, so that the Board of Trade became the committee exercising its functions through the official receiver: Bankruptcy Act, 1883, s. 22, sub-s. 9. The official receiver from time to time authorized the trustee to employ Mr. Tucker as his solicitor to transact certain matters in the bankruptcy, and on each occasion limited the amount of costs to be incurred in the particular matter. The total amount of costs so authorized was 111*l.* In February, 1913, Mr. Tucker carried in for taxation one bill of costs in which he included all the matters referred to in the said authorities. The taxing Master taxed and allowed the bill at 110*l.* 13*s.* 10*d.*, including the costs of the taxation, and issued an allocatur for that amount which was paid by the Board of Trade to Mr. Tucker in March, 1913.

In May, 1915, the debtor, having paid 10*s.* in the pound to his creditors, proposed to pay the balance of his debts in full and to apply for the annulment of his bankruptcy. On May 31, 1915, he gave notice of motion for an order that the taxation might be reopened, the allocatur set aside, and the bill of costs referred to the taxing Master for taxation on the basis of the authorities given by the official receiver in bankruptcy as committee of inspection. The grounds of the application were (1.) that a separate bill of costs ought to have been carried in and taxed under each authority, the effect of including all the costs in one bill being to make the authorities supplemental to each other, so that where the limit of one authority was exceeded the excess was made good out of any other authority in which the limit was not reached; (2.) that items had been allowed for work done before the authority was granted; and (3.) that the bill contained charges for work which was unauthorized. On November 25, 1915, the adjudication was annulled. The motion came before Horridge J. on December 13, 1915, when he dismissed it. He held that, although the Court might in a proper case reopen a taxation and allow the bankrupt to attend, in this case no special reason was shown for reopening the taxation, which was completed two years ago at a time when the bankrupt had no interest whatever, apart from his trustee, in the administration of his estate in bankruptcy.

The debtor appealed.

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E. Clayton, K.C., and *E. W. Hansell*, for the appellant. The bankrupt has a right to reopen the taxation, which has been carried out on a wrong principle. The trustee may employ a solicitor to do any business which may be sanctioned by the committee of inspection: Bankruptcy Act, 1883, s. 57; but no payments are to be allowed by the taxing Master unless he is satisfied that the employment of the solicitor has been sanctioned in respect of the particular matter out of which the charges arise: Bankruptcy Act, 1883, s. 73. Separate bills of costs ought to have been carried in in respect of each of the matters authorized by the official receiver. In some cases the limit put upon the costs to be incurred in respect of a specific matter was not reached, and the balance was wrongly carried over to other matters in which the limited costs were exceeded. The whole of the costs were thus lumped together and the solicitor has received more than he ought to have done. This is not in accordance with the Act and Rules. The Court has jurisdiction to allow the bankrupt to reopen the taxation, and this is a proper case for such an order: *In re Duncan, Ex parte Duncan* (1); *In re Duncan, Ex parte Official Receiver* (2); *In re Vavasour* (3); *In re Geiger.* (4)

Schiller, K.C., and *Morle*, for the respondents. In the cases relied on for the appellant the debtor had leave to attend and took the objections on the taxation in the ordinary course. In *In re Geiger* (4) the bankrupt was directly interested in the bill, and the circumstances of that case were very special. Assuming that the taxing Master has gone wrong on a question of principle, the Court has a discretion as to ordering a reopening of the taxation.

This case is governed by *In re Leadbitter* (5), although no doubt that was a decision under the Solicitors Act, 1843 (6 & 7 Vict. c. 73). Here the bankrupt was only interested in a possible surplus which could not come into existence until the bankruptcy was disposed of.

[PHILLIMORE L.J. referred to *In re Vavasour.* (3)]

No doubt the Court has jurisdiction to allow the bankrupt to attend the taxation, but that is different to reopening it.

[LORD COZENS-HARDY M.R. We think the question of jurisdiction was expressly decided in *In re Geiger.* (4)]

(1) [1892] 1 Q. B. 331.
(2) [1892] 1 Q. B. 879.
(3) [1900] 2 Q. B. 309.
(4) 1915] 1 K. B. 439.
(5) (1878) 10 Ch. D. 388.

That case may be distinguished on the ground that the bankrupt applied before the taxation had taken place, and the Court thought that it ought to be reopened. At any rate it is a matter of discretion, and the reopening should not be allowed in this case.

[At the request of Lord Cozens-Hardy M.R., Phillimore L.J. gave the first judgment.]

PHILLIMORE L.J. This is an appeal from the judgment of Horridge J. dismissing a summons by Mr. Yeatman, who was the bankrupt, asking that the taxation of costs should be reopened. The grounds upon which he rests his objections to the taxation are three special grounds. The first is that the taxing Master has allowed charges which are prohibited by the Bankruptcy Act and Rules; the second is that he has allowed costs for work done before any authority was given; and the third is that costs have been allowed for which no authority was given—that is to say, costs have been allowed in excess of that which was authorized.

In this case there was no committee of inspection, and there was a trustee. The result is that under the Bankruptcy Act of 1883, which governs this case, by s. 22, sub-s. 9, the Board of Trade is to do any act and give any direction or permission which would otherwise be done or given by a committee; and by r. 337 of the Bankruptcy Rules, 1886, the functions of the Board of Trade may, subject to the directions of the Board, be exercised by the official receiver; and accordingly in this case the trustee, when he desired to get sanction for any expenditure, went to the official receiver. Now the trustee cannot as of right and of his own motion charge the estate of the bankrupt with the costs of the solicitor. By s. 57, sub-s. 3, the trustee may, with the permission of the committee of inspection, "employ a solicitor or other agent to take any proceedings or do any business which may be sanctioned by the committee of inspection." That being so, he has to get the sanction of the committee of inspection, or, in this case, of the official receiver acting for the Board of Trade, before he can properly employ any solicitor, as the cases have very clearly decided; and the penalty for his employing a solicitor to do work for which he has not authority is exacted by disallowing the costs upon the taxation; and the taxing Master is directed by s. 73 of the Act

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to examine into the matter, and sub-s. 3 provides: "All bills and charges of solicitors," and certain other persons, "not being trustees, shall be taxed by the prescribed officer, and no payments in respect thereof shall be allowed in the trustee's accounts without proof of such taxation having been made. The taxing Master shall satisfy himself before passing such bills and charges that the employment of such solicitors and other persons, in respect of the particular matters out of which such charges arise, has been duly sanctioned." Rule 117 of the Bankruptcy Rules, 1886, requires that the taxing Master shall have before him a certificate in writing setting forth whether any special terms have been agreed to and a copy of the resolution or other authority sanctioning the employment. Under that rule it was decided that the committee of inspection when giving its sanction may limit, and ordinarily does limit, the amount of costs to be incurred. That was decided in the case of *In re Duncan, Ex parte Official Receiver.* (1) This being so, the trustee on this occasion applied at several periods for authority to take various proceedings and to have sanction or permission in each case for the particular work which he sought to do, and in each case he was strictly limited as to the amount to be expended. The first entry is on December 29, 1911, and there the trustee's solicitor was authorized to act for the trustee and to apply by letter for a payment from a lady under an indemnity, and if she failed to comply then to bring an action, and the costs were not to exceed 25*l.* Then on March 4 he was allowed to do three separate matters, the limit being 10*l.* for item 1, 1*l.* for item 2, 3*l.* for item 3, and so forth. What happened was that pending the bankruptcy, and before Mr. Yeatman had paid in full, that bill was carried in for taxation, and nobody appeared on the taxation at all. The bill was carried in by the solicitor, and the trustee, of course, might have appeared, if he had chosen. It is possible that the official receiver also might have appeared; but the matter was left to the taxing Master, and the bill as carried in was not a bill working out each of these several applications and showing how much had been incurred in the way of costs with regard to each of these applications, which would have enabled the taxing Master to see at once whether, to use his own phrase, the limit of

(1) [1892] 1 Q. B. 879.

costs in the different matters had been reached or not, but it was one bill made out in chronological order without any distinction as to the particular sanction applying to any particular item of costs. It is true that if you add up all the items in the bill and add up all the sanctions, subject to a point taken by Mr. Yeatman in his affidavit as regards one item, the total of the bill does not exceed—indeed it is less than—the total of the sanctions; but that is not the proper way in which to look at this matter. The trustee was entitled to employ a solicitor to do two pieces of business and spend a sum not exceeding 10*l.* in one and not exceeding 20*l.* in the other. But he was not authorized to spend 25*l.* in the second because he had only spent 5*l.* in the first; and the bill ought to have been made out in such a way as to enable the taxing Master to see whether or not any of the sanctions had been exceeded. The taxing Master is said not to have required that. There may be therefore no comment to be made on the solicitor's action in bringing in the bill in the way in which he did if he drew the attention of the taxing Master to it. But still it does remain that it is quite possible that, as the bill has been brought in and taxed, the sanctions may have been exceeded. Mr. Yeatman, the former bankrupt, makes a distinct point as to various matters in which he said the sanction had been exceeded, and his affirmation is not traversed except in general terms. We have invited the learned counsel who appear for the respondents to deal with various items, and as far as one can judge, with such assistance as they were able to give us, it would appear that in some of the cases the amount sanctioned has been exceeded; at any rate it seems a matter for inquiry. Now if those items have been exceeded, there has been a distinct infraction of the Act and Rules which the Court ought almost to take judicial notice of without any application being made to it by any party; at any rate, there has been a distinct infraction of the Act and Rules, and unless Mr. Yeatman has no locus standi to bring the matter before us, or unless the matter is to be held as concluded as regards the taxation by the period of time that has elapsed, the taxation ought to be reopened.

Now the jurisdiction to reopen a taxation of this sort was affirmed by this Court quite recently in the case of *In re Geiger* (1), where

(1) [1915] 1 K. B. 439.

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there had been a taxation and an allocatur pending the bankruptcy and where the bankrupt had succeeded in paying off his debts and having his adjudication annulled. It may be quite true that there were special circumstances in that case which made it desirable that, if the Court exercised jurisdiction, it should exercise jurisdiction by directing the taxation to be reopened. But if the Court had no jurisdiction, then, however strong the circumstances were, the Court could not have done it. Therefore that case decides that, notwithstanding that there has been a taxation regular in form in the sense that all the parties who had the right to be there were cited and able to be present, notwithstanding that there has been a taxation regular in form and an allocatur has been made and time has passed, the bankrupt who has had his bankruptcy annulled can, in special circumstances, get an order to reopen the taxation. Speaking for myself, I quite agree that the circumstances in which the jurisdiction should be exercised are very special, and the cases are probably rare. Speaking with the experience of an old judge in the Bankruptcy Court, I should desire that a very tight hand should be held on any such application; but here the first objection raised by Mr. Yeatman is an objection that the law has been infringed, and that charges have been made which the law has prohibited being made against the estate of a bankrupt. This objection has a fair amount of substance in it, and there is a case made for inquiry. Upon this ground it seems to me that there ought to be a reopening of the taxation, because a prima facie case of infringement of the limits imposed by the statute has been made out.

With regard to the other two classes of objection, the second is that costs have been incurred before any authority was given; and this also is a serious matter, because there is a provision in the Act enabling application to be made and expenditure to be incurred where the matter is urgent and for getting ex post facto sanction; and it may be that that also is a sufficient cause for reopening the taxation; but I prefer to rest this case upon the first point.

I should add that there is no hardship on the trustee, because if he embarks on a matter and finds that the limit he has been given is one that will not enable him satisfactorily to conclude it, he can always apply for further sanction.

Then the last ground is that some small items—but they may add up to an important sum—have been incurred without any authority at all. This is merely a matter of detail; and, speaking only for myself, I am not sure that I should have ordered the taxation to be reopened in respect of that class, or, indeed, necessarily of the second class of objection; but Mr. Yeatman having established, in my view, his right to have the taxation reopened with regard to the first class, there is no reason why it should not be reopened generally, and therefore an order should be made allowing this appeal and directing the taxation to be reopened.

LORD COZENS-HARDY M.R. I entirely agree, and I only wish to add this: In the case of *In re Geiger* (1) Swinfen Eady L.J. said, at the end of his judgment, this: "It is clear that neither the payment to the solicitors of the amount of the allocaturs, nor the audit of the trustee's accounts, nor the annulment of the bankruptcy prevents this Court from having full jurisdiction to deal with the matter on the present application." That is a clear affirmance of the jurisdiction of the Court.

WARRINGTON L.J. I only desire to add a few words. As to the jurisdiction to reopen the taxation on the application of a debtor whose bankruptcy has been annulled, the case of *In re Geiger* (1) has been referred to as having decided that and is binding on us. The only question is whether the circumstances of the case are sufficient to justify the exercise of that jurisdiction.

Now the principal complaint of the applicant is that the solicitor has, in defiance of the statutory provision in that behalf, been allowed in particular cases more than the sum the incurring of which was authorized by the particular sanction, although the total amount allowed on taxation does not exceed the aggregate of the sums covered by the several sanctions. I think the contention of the applicant is made out, in point of fact, in at least two cases. It is in my opinion of the utmost importance that these provisions, intended as they are to maintain an effective control over the legal expenses incurred, shall be strictly observed, and I think it is a matter for regret that a solicitor should have been allowed to carry

(1) [1915] 1 K. B. 457.

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in a bill in such a form that what has happened here may readily occur. It is the solicitor who knows in respect of what particular matters of business particular charges have been incurred, and I think it ought to be incumbent on that solicitor so to classify the items of charges that that fact shall clearly appear. It is on this ground that I think we ought to make an order to reopen this taxation, and, speaking only for myself, I think it would not be sufficient to justify the exercise of the jurisdiction merely to show that the applicant has what I may call ordinary objections to the taxation; but, as we are on the one special ground reopening the taxation, I agree that the order ought to be made in general terms.

Solicitors: *Tarry, Sherlock & King; John Tucker.*

G. A. S.

Applied. Re A DEBTOR (No. 564 of 1949). [1950] 1 All E.R. 308.

Applied. Re A DEBTOR (No. 564 OF 1949) [1950] 1 Ch. 282

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1915 *Dec.* 8, 15. C. A. 1916 *Feb.* 22; *March* 3.

THE KING *v.* INCOME TAX COMMISSIONERS FOR NEWMARKET DIVISION OF SUFFOLK.

Ex parte HUXLEY.

Revenue—Income Tax—Infant—Liability to Assessment—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *ss.* 41, 51, 53, 173—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sched. D.*

An infant who has no trustee or guardian having the direction, control, or management of his property within s. 41 of the Income Tax Act, 1842, is assessable to income tax in respect of his personal earnings.

Decision of Ridley, Lush, and Low JJ. reversed.

RULE directed to Income Tax Commissioners to show cause why a writ should not be awarded prohibiting them from making, entertaining, acting, or proceeding upon an assessment under the Income Tax Acts for the year ending April 5, 1915, upon William Huxley, on the ground that he being an infant was not assessable personally to income tax.

Huxley was an infant and carried on the profession or vocation of a jockey, and as such he earned large sums of money. During the material time he had no trustee or guardian or other person

acting on his behalf having the direction, control, or management of his property or concern within the meaning of the Income Tax Acts. Huxley, having been assessed at 2000*l.* under Sched. D of the Income Tax Act, 1853, in respect of his earnings as a jockey, applied for and obtained this rule.

1915. Dec. 8. *Sir Frederick Smith, A.-G.*, and *T. H. Parr* (for *Raymond Asquith*, now serving with His Majesty's Forces) showed cause on behalf of the surveyor of taxes. By s. 100 of the Income Tax Act, 1842, Sched. D, income tax is to be paid on every description of property or profits not included in the other schedules and is to be "charged annually on and paid by the persons, bodies politic or corporate, fraternities, fellowships, companies or societies . . . . receiving or entitled unto the same," and by s. 2, Sched. D, of the Income Tax Act, 1853, the tax is declared to be payable "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom, from any kind of property whatever." The word "persons" prima facie includes infants, and in the absence of any express provision excluding them they must be taken as included. A consideration of the various sections of the Income Tax Acts makes it clear that infants are assessable. Thus, by s. 41 of the Act of 1842, "the trustee, guardian, tutor, curator, or committee of any person, being an infant, or married woman, lunatic, idiot, or insane, and having the direction, control, or management of the property or concern of such infant, married woman, lunatic, idiot, or insane person . . . . shall be chargeable to the said duties in like manner and to the same amount as would be charged if such infant were of full age, or such married woman were sole, or such lunatic, idiot, or insane person were capable of acting for himself." From that provision the inference is plain that where, as is the case here, the infant has no trustee or guardian having the direction, control, or management of his property the infant himself is assessable, the scheme of the Acts being to tax all persons having incomes beyond a certain amount. In *Tischler* v. *Apthorpe* (1) it was held that the power given by the latter part of s. 41 of assessing an agent does not relieve the principal from his

(1) (1885) 2 Tax Cas. 89.

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liability to assessment when he can be served with the proper notices; see also the observations to the same effect by Fry L.J. in *Werle & Co.* v. *Colquhoun.* (1) Sect. 53, which requires that "every person who shall act in any character as aforesaid for any other person, who by reason of any such incapacity as aforesaid, ... cannot be personally charged by virtue of this Act, shall also . . . . deliver . . . . a true and correct statement in writing, signed by him . . . . of the amount of the profits and gains to be charged on him on account of such other person," is merely a machinery section, and it applies where an infant has in fact a trustee or guardian having the direction, control, or management of his property. Sect. 173 of the Act of 1842, which enacts that "where any person chargeable with the duties hereby made payable as aforesaid shall be under the age of twenty-one years . . . . in every such case the parents, guardians, or tutors of such infant, upon default of payment by him . . . . shall be and are hereby made liable to and charged with the payments which the infant ought to have made . . . . and all parents, guardians, or tutors making payment as aforesaid shall be allowed every sum paid for such infants in their accounts . . . . ," and a similar provision in s. 92 of the Taxes Management Act, 1880, show quite clearly that the assessability of infants was contemplated by the Legislature.

Bremner, for the Commissioners.

Latter, in support of the rule. Income tax is by Sched. D charged on profits, and in the case of an infant's income from investments can be deducted at the source. In *Purdie* v. *Rex* (2) it was said by the suppliant that, being a married woman, she was not personally liable to income tax, and as the tax had been deducted from dividends payable to her she was entitled to recover the amount from the Crown. Rowlatt J. decided that the tax being on profits or gains was charged on the company paying the dividends and could not be recovered by the suppliant. The question here, however, is whether an infant can be personally assessed. Probably the Legislature in 1842 considered that the case of an infant who was actually earning an income above the taxable amount was so rare as to be negligible. Certainly no

(1) (1888) 20 Q. B. D. 753, 762. (2) [1914] 3 K. B. 112.

section says expressly that an infant is assessable, and where a statute imposes a duty upon " persons " there is an implied exception in favour of infants wherever the statute provides for something being done which requires on the part of the person doing it perfect reason and understanding: *Stowel* v. *Lord Zouch* (1); *Newry and Enniskillen Ry. Co.* v. *Coombe* (2); *North Western Ry. Co.* v. *M'Michael* (3); and in this matter the law knows no distinction between infants of tender and of mature years: per Parke B. in *Morgan* v. *Thorne* (4) and per Eve J. in *In re Royal Naval School.* (5) Applying that principle to the provisions of the Income Tax Acts, it is obvious that an infant has not that perfect reason and understanding which are necessary in order to comply with the numerous requirements imposed upon persons chargeable. The making of the returns as to annual value of property and amount of profits required by s. 52 of the Income Tax Act, 1842, demands great understanding on the part of the person making them. Further, by s. 111 of the Taxes Management Act, 1880, duties may be sued for and recovered in the High Court. Nothing is there said as to how an infant can defend himself in such a proceeding, and the reason obviously is that it was not contemplated that an infant should be personally assessed. What was contemplated was that the assessment should be made in the name of his trustee, as apparently it was assumed that every infant who had a taxable income would have a trustee or guardian. Moreover, an infant cannot appeal: see Simpson on Infants, 3rd ed., p. 380; he cannot, therefore, appeal against an assessment, and that again shows that he was not intended to be assessed. An examination of the various assessment sections of the Income Tax Acts confirms the inference to be drawn from the consideration of those principles that an infant is not personally assessable. By s. 41 of the Act of 1842, which collocates the various classes of incapacitated persons, the trustee or guardian of an infant is made chargeable " in like manner and to the same amount as would be charged if such infant were of full age." That clearly contemplates that an infant is not personally chargeable. If the Attorney-General's argument on s. 41 is right, there would have been

(1) (1569) 1 Plowd. 353, 364.
(2) (1849) 3 Ex. 565, 574.
(3) (1850) 5 Ex. 114, 124.
(4) (1841) 7 M. & W. 400, 408.
(5) [1910] 1 Ch. 806, 813.

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no need for s. 45, which makes special provision for a married woman being chargeable in certain circumstances, but neither that section nor any other makes a similar provision in the case of an infant. Sects. 51 and 53 confirm the view now contended for. Sect. 53 makes it quite clear that in the case of an infant or other incapacitated person it is the trustee or other agent who is chargeable "on account of such other person." As to s. 173, upon which reliance is placed by the Attorney-General, it is to be observed that it is not an assessing section, but is dealing with collection and payment of the tax; it makes the infant's parents or guardians liable and enables them to credit the payment in their accounts with the infant. The section does not touch the question now under consideration.

Cur. adv. vult.

Dec. 15. RIDLEY J. read the following judgment:—The question we have to determine in this case is whether a person who, being under the age of twenty-one, makes large profits as a jockey is assessable to income tax in respect thereof. It seems to me that the answer to this question must depend on the construction of the statute, and that we shall derive little assistance from a consideration of the general law relating to infants and their capacity or incapacity to contract.

Now it is said by the Attorney-General that the words in the charging section in Sched. D of the Income Tax Act, 1853, "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom," do include and apply to infants who are properly described as "persons." No doubt that contention is true so far as the grammatical meaning of the word is concerned; but it is obvious that in the case of this statute the section which gives directions as to charging, collecting, and so forth, and as to particular relationships between different classes of persons, will control the mere grammatical meaning of the word.

When we turn to s. 41 of the 1842 Act (so far as it relates to infants) we find a direction that the trustee or guardian of an infant having the direction, control, or management of the property of such infant shall be chargeable to the duties in like manner as "if such infant were of full age." Now, if the infant himself were chargeable,

would the section have been put in that shape? It deals only with trustees or guardians who have the control of the property and who are therefore to be chargeable with the duties. If the cestui que trust for whom they are acting, being an infant, was chargeable as such, why should not the words have been "in like manner as the infant himself"? The intention was, as it seems, to make such trustees and guardians chargeable, not in the place of persons themselves chargeable, but of persons themselves not chargeable, and to impose the duties on the trustees and guardians who have charge and control of the properties which would otherwise escape the duties altogether. Next, I find it difficult to read s. 53, which speaks of the incapacity of certain classes of persons, unless it assumes that infants (amongst others) are incapacitated from being personally charged; and on turning to s. 173, which was also referred to, I cannot read it as making any other provision in this matter. This section directs that when an infant does not pay the duties charged the parents, guardians, or tutors of such an infant shall be liable to do so; but it is not a charging section and places no duties on an infant which are not to be found elsewhere in the Act. The guardians are to retain the duties out of moneys coming into their hands and are to charge the infant in the accounts between them and him: see ss. 44 and 173.

For these reasons I think that if an infant has no guardian or trustee within the meaning of s. 41 of the Act, then the Act does not charge him and he is not chargeable at all. However we may regret that a person like this jockey should escape paying income tax on his profits, we cannot stretch the provisions of the Act.

LUSH J. read the following judgment:—The question in this case is whether a person under the age of twenty-one who has made large profits as a jockey, which are under his own control, is assessable to income tax and is bound to make a return and perform all the other duties which are imposed on persons of full age by the Income Tax Act, 1842, and the Taxes Management Act, 1880. The Attorney-General contended that if he is not, the profits he has made are not taxable as he has no trustee or guardian who has the control, direction, or management, and who therefore can be assessed under s. 41 of the former Act. His argument was this: Sched. D

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makes the profits or income of "all persons" taxable. Therefore an infant is chargeable unless exempted by the Act. And he contended that inasmuch as the trustee or guardian is only chargeable if he is in "control," which he is not in this case, the infant must be the person chargeable because all profits, by whomsoever made, are subject to the tax. Is this reasoning sound? Now there can be no doubt that the Legislature in passing the Act of 1842 considered that all profits had been brought within the range of the Act. But we must be satisfied, before we can decide in favour of the Crown, that it has enacted expressly or by implication that an infant is assessable and is subject to the duties which the Act imposes. Is an infant included in the comprehensive term "all persons"? Is he treated by the Legislature as if he were sui juris and personally responsible because he makes profits and no guardian is in control or has been appointed? In my opinion he is not. If he is, it matters not of what age he is, for, as Parke B. said in *Morgan* v. *Thorne* (1), "the law knows of no distinction between infants of tender and of mature years." It seems to me impossible to hold that an infant, who is in theory and contemplation of law of no "discretion," who cannot ordinarily be served with legal process or exercise a right of appeal, who cannot even state an account (see Infants Relief Act, 1874), should for the purposes of assessment to income tax be treated as subject to all these obligations and possessed of all these rights unless the Legislature has clearly so provided. "It is . . . . an established rule of construction [of statutes] that general words and phrases, however wide and comprehensive in their literal sense, must be construed as bearing only on the immediate object of the Act, and as not altering the general policy of the law, unless, of course, no reasonable sense can be applied to them consistently with the intention of preserving that policy untouched": Maxwell's Interpretation of Statutes, 1st ed., p. 66. The expression "all persons" certainly does not include a lunatic if the obligations imposed on "all persons" are such that a lunatic cannot properly discharge them: see as to this *Eyston* v. *Studd* (2); Bac. Abr. Stat. I. 6.

Now it is certainly not clearly enacted that an infant can be compelled to make a return and perform the various duties imposed on

(1) 7 M. & W. 408. (2) (1574) 2 Plowd. 459, 465.

persons chargeable. Sect. 41 of the Act of 1842, on the contrary, groups infants with persons under disability, lunatics, &c., with whom they are usually connected when reference is made to incapacitated persons; and I think that s. 53 clearly recognizes that they are under a disability, whether or not a guardian may control or manage their property. Sect. 41 appears to me to contemplate that if an infant makes substantial profits or has a substantial income he will in the ordinary course have such a guardian. It possibly contemplates that a guardian may be appointed. I do not think that it is possible to extract from it a clear statement that if he has not a guardian he is personally bound to perform all the duties which the Act imposes. It is noticeable that, although a married woman was placed in the same category as an infant by s. 41, the Legislature did recognize in her case that she might have separate property of her own and under her own control, and expressly provided for such a case by s. 45, whereas there is no such provision in the case of an infant who makes and retains profits for himself. Sect. 51 again, in terms which are perhaps a little involved, appears to recognize that if the owner of the profits is under age the guardian, who is apparently treated as necessarily existent, cannot even be charged in the infant's name. Again, by s. 173, the parent or guardian of every infant—it will be observed that the section is not limited to infants whose income is under the control of the parent or guardian—is made responsible for the tax on the infant's income unless the latter in fact pays it. It cannot be that the Legislature intended that the infant should be the person to make the return, receive the notices, &c., and that his parent should be responsible for the tax. Sect. 44 provides that the latter may retain the income in order to meet the tax, and s. 173 itself provides for his charging the infant in his accounts for what the parent has paid. This again appears to assume that in every case the infant who owns the property which is to be taxed has a parent or guardian in fact who is in control of it and who is the proper person to be assessed.

These considerations lead, I think, inevitably to the conclusion that the Legislature never contemplated or provided for a case like the present where no person is in existence or has been appointed to intercept the profits. At all events it seems to me clear that it is nowhere stated expressly or by implication that an infant is himself

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to be assessed and treated as the person responsible for the performance of the duties which it imposes. We have only to say if it has so enacted. Although in the special circumstances of this case I regret to be obliged to come to the conclusion, I think that the rule should be made absolute.

Low J. The entire argument of the learned Attorney-General, as I understood it, was based upon the use of the word "person," and he pressed upon us that that must necessarily include everybody. It seems to me that the use of the word "person" in a statute must necessarily be subject to the special disabilities attaching to particular classes of persons. Much more is that so when one is considering a statute which in its terms repeatedly deals with persons under disability and directs what steps are to be taken with regard to what would have been their liability had they been persons having capacity instead of being persons under incapacity. For instance, the use in this very Act of Parliament of the words "if of full age" seems to me absolutely to recognize the peculiar disability attaching to infants.

Without expressing any very definite opinion upon it, it seems to me that it is quite possible that the officials of the Crown might have got over this trouble by taking proper steps to get a guardian appointed to this particular infant. That, however, does not arise here and is merely an expression of my individual opinion.

So far as the rest of the case is concerned I agree entirely with the two judgments which have been delivered.

Rule absolute.

J. S. H.

The surveyor of taxes appealed.

1916. Feb. 22. *Sir Frederick Smith, A.-G.*, and *T. H. Parr* (for *Raymond Asquith*, now serving with His Majesty's Forces), for the appellant, made use of the same arguments as in the Court below, and also referred to Lord Halsbury's Laws of England, vol. 17, s. 296, p. 128; ss. 46, 48, 51, 52, and 53 of the Act of 1842; and *Earl of Buckinghamshire* v. *Drury*. (1)

(1) (1762) Wilmot's Opinions, 177, 190, 194.

A. M. Bremner, for the Commissioners.

A. M. Latter, for Huxley, in addition to the authorities referred to by him in the Court below, cited *Rex* v. *Kensington Income Tax Commissioners* (1); Chambers on Infants, p. 13; *Hearle* v. *Greenbank* (2); Blackstone's Commentaries, vol. 1, p. 452; Simpson on Infants, 3rd ed., p. 395; *Oliver* v. *Woodroffe* (3); *MacGregor* v. *Clamp & Son* (4); and *O'Shanassy* v. *Joachim.* (5)

Cur. adv. vult.

March 3. LORD COZENS-HARDY M.R. The question in this appeal is whether a jockey under the age of twenty-one, who has made large profits or gains from his business or employment, can be assessed to the income tax. The answer to this question depends upon the construction of a few clauses in the Income Tax Acts which undoubtedly admit of considerable argument. The charging section is s. 100 of the Act of 1842. It makes all "persons" receiving profits chargeable with income tax under Sched. D, and the contention on the part of the Crown is that the infant is a "person" receiving the profits, and that there is nothing in the Act to exempt him from liability, but that, on the other hand, there is a good deal in the Act which tends in the opposite direction. I should add that there is no trustee or guardian or other person having the direction, control, or management of the jockey's business or the earnings thereof.

The Act of 1842, in some of the earlier sections, deals with the common case where trustees, guardians, or other persons have the direction, control, or management of an infant's property, and makes such persons chargeable (s. 41). There are special provisions for returns to be made by such persons (s. 53) and for payment by such persons of income tax, and for the recoupment to such persons of the amount so paid out of the infant's property (s. 45). But these sections all presuppose the existence of such persons. They really are machinery for enabling the Crown, in common cases, to get the income tax which is properly payable. They cannot, in my view, be relied upon for the purpose of showing that

(1) [1914] 3 K. B. 429.
(2) (1749) 3 Atk. 695, 702.
(3) (1839) 4 M. & W. 650.
(4) [1914] 1 K. B. 288.
(5) (1876) 1 App. Cas. 82.

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an infant who has no such trustee or guardian cannot be made liable. When I look at s. 173 of the Act of 1842 and s. 92 of the Act of 1880, it seems to me plain that the infant is "chargeable" with the duties, although he is under twenty-one, and that he is a "person" who ought to make payment of the duties with which he is chargeable. I cannot escape from the language of those two sections. They seem to assert that the infant is a Crown debtor, except so far, if at all, as a different result may follow under the earlier sections where there is a trustee or guardian.

It is argued that it is a great hardship thus to assess and charge an infant, because he has not the requisite discretion to make the return and to defend proceedings or to appeal as is contemplated by the Act. I am not pressed with this difficulty. By s. 48 "every person chargeable," which includes an infant, is to receive from the assessors notice requiring the delivery of certain particulars, and, if he does not deliver such return, the assessors may proceed in his absence. It is to my mind almost absurd to suggest that a jockey making a large income, and, I presume, assisted by clerks or other servants, has not the requisite discretion to enable him to deliver, or procure to be delivered, all proper particulars, and, if necessary, to instruct legal advisers to protect his rights. But however that may be, I think the statutes have made the infant "chargeable" and "assessable" and therefore liable to pay income tax.

Great stress was laid on the analogous case of a person of unsound mind. But I see no reason to doubt that the same considerations would apply to that case. If the person of unsound mind was carrying on a business under his own control and management, I think he would be chargeable and assessable in the same manner, and to the same extent, as the infant in the present case.

In the Divisional Court it was held that the generality of the charging section was controlled by the wording of other parts of the Act. With great respect, I am unable to follow this view. I think the order appealed from must be discharged and an order made in the terms of the notice of appeal.

PHILLIMORE L.J. A rule nisi for prohibition to the Commissioners for the Newmarket Division of Suffolk upon notice to the surveyor of taxes to prohibit the Commissioners from proceeding

in the matter of an assessment under the Income Tax Acts upon one William Huxley was made absolute by the King's Bench Division. The Commissioners and, I understand, the surveyor have appealed from the order making the rule absolute and directing the issue of a writ of prohibition. The assessment is under Sched. D, and the point taken on behalf of Huxley is that he was and is an infant and cannot be compelled to make a return, and that as he cannot be compelled to make a return, no assessment can be made upon him.

It appears that Huxley is a youthful jockey who has not yet attained twenty-one, but has made considerable profits by his skill in his calling. He has no guardian. His father, it was stated before us, had deserted his wife and family. At any rate, he is not living with the infant, or the infant with him, but the infant is living with his mother, or his mother with him. Upon the materials before us he receives his fees or payments himself, and, indeed, it is difficult to see how, if he had a guardian, which he has not, anybody but himself would have any right to receive his fees and payments.

That an infant is not, as such, immune from income tax was conceded. If he be an occupier of land, he is chargeable under Scheds. A and B, with a right, if he be a tenant, to deduct from the rent payable to his landlord that which he pays under Sched. A. If he be in receipt of dividends or other interests coming under Sched. C, which are taxed at the source, so that the tax is deducted from the dividend, he cannot recover from the Crown the tax so deducted.

Under s. 100, Sched. D, the duties under that section shall be charged annually on and paid by the persons receiving or entitled to the property or profits coming under this schedule, their executors and administrators. Prima facie an infant is a person.

Sect. 41 contemplates that, at any rate in certain cases, an infant may be taxable, for it enacts that the trustee, guardian, tutor, curator, or committee of any person, being an infant or married woman, lunatic, idiot, or insane, and having the direction, control, or management of the property or concern of such infant, &c., shall be chargeable to the said duties in like manner and to the same amount as would be charged if such infant were of full age,

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&c., and the person chargeable is to be answerable for the doing of all such acts, matters, and things as shall be required to be done by virtue of this Act in order to the assessing of any such person to the duties granted by this Act and paying the same.

Sect. 53 requires every person who acts in any character as aforesaid for any other person who, by reason of any such incapacity as aforesaid, cannot be personally charged by virtue of this Act to deliver a true statement of the profits and gains to be charged.

And s. 173 provides that, where any person chargeable with the duty shall be under twenty-one, or, being chargeable, shall die, the parents, guardians, or tutors of such infant, upon default of payment by him or the executors and administrators of a person dying, shall be and are hereby made liable to be charged with the payments which the said infant ought to have made or the person dying is chargeable with.

Sect. 92 of the Taxes Management Act, 1880, repeats in substance, if not in terms, the provisions of s. 173 of the Act of 1842.

It might well be inferred from ss. 41 and 53 and s. 100, Sched. D, even if they stood alone, that an infant was not immune from taxation under Sched. D, that in some way or other a proper proportion of his income under Sched. D ought to be recovered by way of taxation. But it is hardly necessary to resort to the inferences to be drawn from ss. 41 and 53, because s. 173 and the corresponding section in the Act of 1880 speak of a person under twenty-one being chargeable with the duties under the Act, of default of payment by an infant, and of his parents, guardians, or tutors being liable to payments which the infant ought to have made, thereby expressing clearly that the infant is a debtor to the Crown for income tax levied under the Act, and, apparently, under all schedules of the Act.

The difficulties in the way of the Crown are, first, that no machinery is directly provided for compelling an infant who has not a guardian or tutor to make a return; a return, or default in making a return, being the necessary preliminary to an assessment; and that s. 53 speaks of classes of persons, which classes include some infants who by reason of any such incapacity as aforesaid cannot be personally charged. And these difficulties have led the judges in the Court below to determine that in a case like the present no return can be

compelled and no assessment made. Lush J. was further influenced by the construction which he put upon s. 173, to the effect that the parents, guardians, or tutors would apparently be made liable for the infant's default, even though they had not received or had the control of the infant's income.

A suggestion that the difficulty in the present case might be avoided by the Crown's getting a guardian appointed was made by Low J., and I am not sure that the contingency was not also contemplated by Lush J. Ridley J., I think, thought that it was a casus omissus.

All the members of the Court appear to have thought that the word " persons " in s. 100, Sched. D, must be read as not including infants, and that s. 41 was a charging section imposing the duty which would have been charged, if an infant were of full age, upon his guardian or tutor.

That is in my view a mistake.

The language of s. 173 and its re-enactment in 1880 show that the general word " persons " would include infants. Sect. 41 only provides machinery for an infant who has a guardian having the direction, control, or management of his property or concern, and s. 173 must be read as confined to such a guardian, or to a parent who, as not unfrequently happens, with technical impropriety, but under a common-sense arrangement, receives property on behalf of his infant child, and is then chargeable in equity as if he were a trustee. This being so, we have a direct charge upon the infant, and the necessary machinery for enforcing that charge must be supplied.

As the machinery of ss. 41 and 53 cannot be applied, the general provisions requiring every taxable person to make a return attach.

Sect. 53, where the expression " incapacity " is used, may be rightly confined to the case of an infant who does not receive or control his own property, and who is therefore incapable of making a return.

It was urged before us that the making of a return is a matter of difficulty, and that an infant is not supposed by the law to be capable of doing such difficult business matters ; that every subject who is assessed has a right to appeal, and that an appeal is in the

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nature of a lis; and that no lis in which an infant is concerned can be conducted in the Courts unless he have a guardian ad litem.

I think the answer is that in most, if not quite all, of the rare cases in which an infant becomes chargeable under Sched. D it would be because of his exceptional and precocious skill; that such an infant may be presumed to be capable of either making a return or of instructing and paying some competent adviser, and that the analogy of a lis must not be pushed so far.

It is not necessary to consider what might be the decision if the infant had a guardian having the direction and control or management of his property and the Crown was minded nevertheless to require a return from the infant. But in that case the decision on another part of the same section, namely, *Tischler* v. *Apthorpe* (1), approved as it was in this Court in the case of *Werle & Co.* v. *Colquhoun* (2), would have to be reckoned with.

I agree that the appeal must be allowed and the order for a writ of prohibition discharged.

WARRINGTON L.J. The King's Bench Division has in this case made absolute a rule for a prohibition directed against certain Income Tax Commissioners and restraining them from assessing one William Huxley for the purposes of income tax. William Huxley is an infant pursuing the calling of a jockey and earning therein considerable profits. There is no guardian or other person who has (to use the words of s. 41 of the Act of 1842) "the direction, control, or management of his property or concern," and the question is whether an infant in that position is liable to be assessed to and to pay income tax in respect of the profits he earns.

The Crown contends that according to the true construction of the Income Tax Acts there is nothing to exclude an infant from the admittedly general terms in which the charging provision is framed, and that he accordingly is liable to be charged, and is under the further liability to make the necessary returns, to be assessed, and to pay the tax following as a matter of course.

The duty is granted "for or in respect of the annual profits or gains arising or accruing to any person residing in the United

(1) 2 Tax Cas. 89. (2) 20 Q. B. D. 753.

Kingdom . . . . from any profession, trade, employment or vocation " (see Sched. D to s. 2 of the Income Tax Act, 1853), and it is to be charged annually on and paid by the persons receiving or entitled unto the same. Persons chargeable to the duties are on receiving the proper notice to make returns of the amount of their profits and gains. On these returns, or in default of them, they are to be assessed by the Commissioners. Liability to pay follows as the consequence of assessment.

The guardian of an infant having the direction, control, or management of his property or concern is chargeable in the like manner and to the same amount as would be charged if such infant were of full age, but no express provision is made for the case of an infant who in fact controls or manages his own property or concern : Act of 1842, s. 41. There is nothing, in my opinion, in the words of the Act tending to show that infants are intended to be excluded from the class of persons chargeable. The expression in s. 41 " as if such infant were of full age " was relied upon in argument, but in my opinion these words lose their force when it is remembered that the section is dealing with the case, not of infants generally, but of those whose property or concern is under the management of a guardian. If the man were of full age, he would be free from his guardian, and his concern would be in his own hand. Indeed, so far as the words of the Act are concerned, they support the view that an infant may be himself chargeable, for I cannot read s. 173 without coming to the conclusion that the framer of it assumed, first, that a person under the age of twenty-one years might be chargeable, and, secondly, that an infant might be liable to make a payment under the Act. The words " payments which the infant ought to have made " cannot, I think, be taken as referring only to payments which ought to be made by some one on his behalf. The words referring to default by the infant also point the same way.

But it is said that the general scope and purport of the Act is such that it is a necessary inference that an infant is personally exempt from its requirements. Huxley contends that the Act requires the exercise of skill and intelligence in preparing returns, and of discretion and judgment in deciding whether to appeal, and so forth; that the law treats all infants, whether babies in arms or

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Warrington L.J.

men of twenty years of age, as equally incapable, and that accordingly it cannot be supposed that the Legislature intended to require from any infant what the smallest baby in arms would be incapable of doing. But I think the legal doctrine of equality of incapacity has reference to the question of status before the law, and for the purpose of construing such an Act as the present it has no applicability. I think it is a sufficient answer to the rest of the argument that an infant who controls and manages his own concern, as Huxley does, may well be treated as capable of doing what is required under the Act. The Act itself recognizes this, inasmuch as the provisions of s. 41 making guardians chargeable apply only to those who have the control and management of the infant's property or concern. I am therefore of opinion that an infant in Huxley's position, carrying on his own vocation and earning profits thereby, is liable to be assessed to income tax, and that the rule ought to be discharged.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitors for Commissioners: *Fitch & Cooper, for Button & Aylmer, Newmarket.*

Solicitors for Huxley: *Hobson & MacMahon.*

H. C. R.

NOLISEMENT (OWNERS) *v.* BUNGE AND BORN.

1916
March 14.

Shipping—Charterparty—Lay Days—Completion of Loading before Expiration of Lay Days—Detention of Ship after Completion of Loading—Charterer's Obligation.

A charterer does not commit a breach of contract if he detains the ship for the full period of the lay days, notwithstanding that she may have completed her loading before the expiration of that period.

AWARD by an umpire in the form of a special case.

By a charterparty dated February 1, 1915, it was agreed between the owners of the steamship *Nolisement* (hereinafter called "the owners") and E. A. Bunge and J. Born (hereinafter called "the charterers") that the steamer should load at an Argentine port and, being loaded, should with all reasonable speed proceed to St. Vincent or certain other ports for orders (unless these were given to the master on signing bills of lading) to discharge at certain named ports in Europe or at Algiers.

Clause 13 was as follows: "The steamer shall be loaded at the rate of 225 tons per running day up to the first 3000 tons, and at the rate of 400 tons per running day for any quantity above 3000 tons, Sundays and holidays excepted, otherwise demurrage shall be paid by the charterers at the rate of twopence sterling per gross register ton per running day for steamers of up to 4000 tons dead weight cargo capacity and threepence sterling per gross register ton per running day for steamers of over 4000 tons dead weight cargo capacity. Time for loading shall commence to count twelve hours after written notice has been given by the master or agents on any day (Sundays and holidays excepted) . . . . that the steamer is ready to receive cargo . . . ."

The charterparty further provided that despatch money, to be paid to the charterers before the steamer sailed, should be payable for all time saved in loading, including Sundays and holidays, at the rate for this particular steamer of 15*l.* sterling per day; and that all disputes arising between the parties should be settled by arbitration.

The vessel began to load on March 8, and her lay days, by virtue

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of clause 13 of the charterparty, would expire on April 5; but she in fact finished loading on March 16 at 4 P.M., and at that time the master applied to the charterers for his bills of lading and orders as to destination, but the same were not forthcoming. The steamer was kept waiting three days for the bills of lading and orders owing to the charterers, who had decided to give orders for the discharging port on signing bills of lading, not having made up their minds as to the port to which they should order the steamer. The steamer in fact sailed at 5 P.M. on March 19. It was agreed between the parties, and the umpire found, that the charterers had the right to keep the steamer for twenty-four hours for the purpose of settling accounts, and the dispute between the parties, which formed the subject-matter of the arbitration, had reference to the two remaining days that the steamer was kept waiting, and in respect of which the owners contended that they were entitled to damages.

The umpire found that the steamer was kept two days over and above the said twenty-four hours owing to a breach by the charterers of their obligation to present to the captain the bills of lading and orders as to the port of discharge. He further found that the owners paid to the charterers on accounts made out by the charterers despatch money for nineteen and a quarter days on the footing that the loading of the steamer was completed at 4 P.M. on March 16; that the charterers included in their account for despatch money the time the captain was waiting for his bills of lading and orders; and that the same was not paid under any mistake of fact.

The charterers contended (inter alia) that, the loading time granted them by the charterparty not having been exceeded, the owners were not entitled to claim for demurrage or detention, but only to a return of the despatch money for two days which was paid under a mistake of fact; and that the damages, if any, which the owners were entitled to claim were assessable at the demurrage rate in the charterparty and not on the value of the vessel under the special circumstances of the freight market existing at the time of loading.

The shipowners contended that on completion of the loading the charterers were bound within twenty-four hours to present to the captain his bills of lading and orders and so enable the steamer

to sail; that on the expiration of the said twenty-four hours the steamer was entitled to proceed to sea, and that, having been prevented for two days from doing so owing to the charterers' wrongful action in not giving orders and presenting the bills of lading, they were entitled to claim damages for such detention; alternatively, that, having paid the charterers despatch money for the unexpired time within which they were bound to load the steamer, the loading time must be taken to have expired on the completion of the loading, and that for any time during which the steamer was prevented by the charterers from sailing they were entitled to damages, subject to allowing the charterers twenty-four hours for making out the accounts and the bills of lading and giving orders.

Subject to the opinion of the Court the umpire accepted the owners' and rejected the charterers' contentions and awarded a sum of 300*l.* to the owners. If the Court should be of opinion that his award was wrong, and that the charterers' contention that the despatch money only should be returned was correct, the umpire found that there was due to the owners from the charterers 30*l.*; and if the Court should be of opinion that the award was wrong and that the charterers' contention was wrong as to the return of the despatch money but was right that the damages should be assessed on the basis of the demurrage rate in the charterparty, the umpire found that there was due to the owners from the charterers 94*l.*

Leck, K.C., R. A. Wright, and *Le Quesne,* for the charterers. Lay days are allowed for the charterers' purposes, and unless those days are exceeded the charterers commit no breach of contract by detaining the ship. The fact that the vessel was actually loaded at a date earlier than the expiration of the lay days is immaterial. The charterers agree that they are bound to return the despatch money which was paid to them under a mistake of fact, but that is their only obligation.

Even if they could be held liable in damages the umpire was only entitled to assess them at the demurrage rate.

Maurice Hill, K.C., and *Raeburn,* for the owners. Charterers have no right, after they have completed loading, to detain the ship

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even though the lay days given for loading may not have expired. Charterers may, if they choose, spread the loading over the whole period of the lay days, or they may delay the commencement of the loading till after the lay days have begun to run; but lay days are given for loading and not for any other purpose, and as soon as the vessel has completed her loading there is an obligation upon the charterers not to detain the ship from proceeding on her voyage. There is no authority upon the point, but the view now advanced on behalf of the charterers has never previously been suggested.

Further, the fact that the charterers elected to take despatch money debars them from saying that the lay days did not expire on March 16: see *Oakville Steamship Co.* v. *Holmes* (1), where Bigham J. held that charterers having taken despatch money at the port of loading could not under the charterparty claim to average the days at the port of loading and at the port of discharge in order to avoid demurrage at the latter port.

As the loading was completed on March 16, the charterers were under an obligation to present the bills of lading within a reasonable time—in this case twenty-four hours—and having failed to do so for two more days they are liable in damages in respect of the detention. The question then is, How are the damages to be assessed? The demurrage rate has no application and the damages are at large.

Leck, K.C., in reply. *Oakville Steamship Co.* v. *Holmes* (1) has no application. There the charterers were given an option to average the days for loading and discharge in order to avoid demurrage. Having exercised their option by taking despatch money at the port of loading, it was held that they could not afterwards claim to average the days to avoid paying demurrage at the port of discharge.

ATKIN J., after stating the facts and referring to the terms of the charterparty, continued as follows: The question I have to decide, and upon which there appears to be no authority, is whether, when the charterparty fixes the number of lay days and the ship loads in less than that number of days, the charterer commits a breach of contract if he detains the ship

(1) (1899) 5 Com. Cas. 48.

but permits her to sail within the period of the lay days. In my opinion the charterer in those circumstances does not commit a breach of contract. The lay days provided by the charterparty constitute the period during which the charterer is entitled to have the use of the ship at the port of loading. He is not obliged to use the lay days reasonably. He may, if he likes, although quite unreasonably, refrain from commencing to load until, say, five or six days after the beginning of the lay days, and yet if he completes the loading within the lay days he commits no breach of contract. That is conceded, and that being so, it seems to me impossible to draw a distinction between a period at the beginning and a period at the end of the lay days. If the charterer incurs no liability because he has delayed the ship for three or four days at the commencement of the lay days, it cannot, in my opinion, be said that he commits a breach of contract if, having begun to load the ship at the beginning of the lay days, he delays her for three or four days at the end of the period. The true view is that the charterer has the stipulated period of lay days during which he may delay the ship at the port of loading without incurring liability for demurrage or for damages; in other words, he commits no breach by detaining the ship for that particular period. In this case it was contended that although there was no obligation on the charterers to begin to load the ship at once, yet as they completed the loading within the lay days they were under a duty to present the bills of lading and to interpose no obstacle to the ship performing her duty to proceed with all reasonable despatch; but as there is no obligation on a charterer to use the lay days reasonably or to load during the lay days with reasonable despatch, I do not think that he commits any breach of duty by detaining the ship provided he does not detain her beyond the stipulated number of lay days.

It was further contended that as in this case the charterers had chosen in account with the owners to take despatch money they could not afterwards say that the lay days had not expired at the time from which the despatch money began to be earned. I do not agree. The fact that despatch money is earned has no bearing upon the question when the lay days come to an end. The case of *Oakville Steamship Co.* v. *Holmes* (1) does not assist the owners,

(1) 5 Com. Cas. 48.

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Atkin J.

There by a clause in the charterparty the charterers had the option of averaging days for loading and discharging in order to avoid demurrage. They took despatch money at the port of loading, and it was held that having done that they had lost the option of averaging days to avoid demurrage at the port of discharge; in other words, having exercised their option in one particular way they could not afterwards seek to exercise it in a different way. I therefore see no reason for holding that the acceptance of the despatch money prevented the charterers saying that they were under no obligation to let the ship go before the lay days expired. But the charterers cannot retain the despatch money for the two days which was paid to them upon the footing that they had saved the owners the two days whereas in fact they had not. There was a total failure of consideration in respect of the payment for those two days.

A further question arose as to the measure of damages in case there had in fact been a breach of contract by the charterers. In the circumstances of this case I do not think the umpire would have been bound by the conventional rate of demurrage agreed upon between the parties; but in the view I have taken on the main question it is unnecessary for me to determine this point.

As I take a different view of the charterers' obligation from that taken by the umpire, I hold that his first alternative award, on the footing that the charterers' contention that despatch money only should be returned is correct, ought to stand, and that the sum due to the owners is 30*l.* only.

Judgment accordingly.

Solicitors for charterers: *Thomas Cooper & Co.*

Solicitors for owners: *Church, Rackham & Co., for Donald Maclean & Handcock, Cardiff.*

J. S. H.

DISTINGTON HEMATITE IRON COMPANY, LIMITED *v.* POSSEHL & CO.

1916
March 1.

[1915 D. 1403.]

Contract—Illegality—Alien Enemy—Suspension—Dissolution.

On the outbreak of war between two nations an executory contract between subjects of those nations is suspended, and not dissolved, only when suspension does not involve the making of a new contract between the parties. Where postponement of performance of mutual obligations which fall due during war, or where cancellation of such obligations, would involve a substantial alteration of the contract, no such postponement or cancellation can take place, but the contract is thenceforth dissolved.

A British company agreed to sell all their pig iron of a certain description to a German firm, who agreed to do their utmost to promote the sale of such iron. The German firm were to take a certain quantity yearly, but if they failed to do so they were to incur no liability beyond the loss of control of the output. The British company agreed to refer all continental purchasers to the German firm as their sole agents. In case of strikes or stoppage of their works from unforeseen causes the British company were not bound to deliver, and during mobilization of German military forces the German firm were not bound to take delivery. Twelve months' notice of discontinuance might be given by either party:—

Held, that this contract, involving continuous efforts on both sides, was not merely suspended but was dissolved on the outbreak of war between the United Kingdom and Germany.

TRIAL of action before Rowlatt J. without a jury.

The action was brought under the Legal Proceedings against Enemies Act, 1915. The plaintiffs, a British company, claimed a declaration that an agreement dated July 20, 1911, and made between the plaintiffs and the defendants, a German firm, was dissolved as from 11 o'clock P.M., Greenwich time, August 4, 1914, by the existence of a state of war between the United Kingdom and Germany.

The agreement was as follows:—

"Control.—The Distington Hematite Iron Company, Limited, agree to give Messrs. L. Possehl & Co., Lübeck, the sole sale of their pig iron in small and medium pigs, cast direct from the furnace and through the cupola, guaranteeing same of uniform good quality,

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on the distinct agreement that Messrs. L. Possehl & Co., Lübeck, will do their utmost to develop the sale of the said irons for all purposes for which they are severally adapted.

"Yearly quantities.—Messrs. L. Possehl & Co., Lübeck, bind themselves to take out a yearly quantity of not less than 3000 tons of the above-specified qualities of pig iron, beginning from the year 1912, but in the event that Messrs. Possehl & Co., Lübeck, should not take this quantity of 3000 tons in any one year, no liability to attach to them for the quantities short taken further than the loss of the said control.

"Payment.—Payment to be made net cash on the 15th of each month for all shipments in the preceding month.

"Prices.—Prices to be mutually arranged from time to time to meet buyers' requirements and to enable Messrs. Possehl & Co., Lübeck, to compete also with other similar qualities of the same classes of the hematite pig irons for malleable castings.

"Inquiries from other side.—The Distington Iron Company, Limited, engages to refer all inquiries for their pig iron in small and medium sized pigs cast direct from the furnace and through the cupola for the European Continent to Messrs. L. Possehl & Co., Lübeck, and they undertake to intimate to all their British and foreign customers that Messrs. L. Possehl & Co., Lübeck, are the sole agents for the Continent for the sale of their pig irons as specified above, and that consequently other people are not allowed to offer or to sell either of these kinds of iron for consumption on the European Continent.

"Strike Clause.—In case of strikes, lock-outs, whole or partial cessation of work through mishap or unforeseen causes, works are not bound to deliver so long as such disturbances continue, and on the other hand Messrs. L. Possehl & Co., Lübeck, would not be obliged to take delivery in case of any mobilization of war in which Germany might be interested, but only for the duration of such trouble.

"Discontinuance.—Notice of a discontinuance of this agreement may be given by either party, but must be sent in a registered letter twelve months before the expiration of the calendar year, viz., before December 31, otherwise the contract to remain intact for another year."

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Gore-Browne, K.C., *Leslie Scott, K.C.*, and *F. Dodd*, for the plaintiffs. The performance of this contract has become illegal, the defendants having become alien enemies: *Esposito* v. *Bowden* (1); *Zinc Corporation* v. *Hirsch.* (2) It is an executory contract, and therefore is not merely suspended, but dissolved: *Geipel* v. *Smith.* (3) There can be no suspension or postponement of the operation of a contract except by the terms of the contract. If the suspension or postponement involves making a new contract between the parties the result is that the contract is dissolved.

Roche, K.C., and *Theobald Mathew*, for the defendants. A contract, although executory, may be suspended merely, as opposed to dissolved, by one of the parties becoming an alien enemy: *Janson* v. *Driefontein Consolidated Mines.* (4) So an embargo may suspend without dissolving a contract of affreightment: *Hadley* v. *Clarke* (5); *Andrew Millar & Co.* v. *Taylor & Co.* (6); *Scottish Navigation Co.* v. *Souter.* (7) It is impossible to lay down generally that a contract is dissolved which involves trading with an enemy. It depends on the terms of the particular contract. The parties to this contract have in the "yearly quantities" clause provided for the cesser or suspension of their obligations during war. If the defendants fail to take the yearly quantity they incur no liability in damages, but they lose the control of the plaintiffs' output for that year.

Gore-Browne, K.C., in reply.

ROWLATT J. It is not disputed that this contract imposes upon the parties mutual obligations some of which cannot be performed during the war. The defendants cannot act as agents for sale of the plaintiffs' iron or push the sale of their iron on the Continent of Europe; the plaintiffs cannot supply the defendants with iron or refer continental inquirers to the defendants. That being so, the question is whether this contract is dissolved. The defendants have cited dicta to the effect that contracts are not dissolved but are suspended by war. This is a loose expression which gives rise to confusion. The words themselves really mean that during

(1) (1857) 7 E. & B. 763.
(2) Ante, p. 541.
(3) (1872) L. R. 7 Q. B. 404.
(4) [1902] A. C. 484, 493.
(5) (1799) 8 T. R. 259.
(6) Ante, p. 402.
(7) Ante, p. 675.

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war there is an interval in which the parties are not in contractual relations. But that is not the sense in which the phrase is used. It is used to convey the meaning that performance of the obligations of the contract is either postponed during war or that obligations falling due during war are cancelled, leaving a number of others to be performed in the ordinary way at the end of the war. That is the sense which the defendants wish to convey. The plaintiffs contended that all contracts were dissolved by war except executed contracts where payment is the only obligation remaining to be performed, in which case, they suggest, payment may be postponed until after the war. I am not going to lay down that proposition in the present case.

The plaintiffs' next contention was this: that where postponement of the performance of mutual obligations, or the cancellation of mutual obligations which fall due during the war, involves a substantial alteration of the contract itself, no such postponement or cancellation can take place, because an executory contract is suspended as opposed to dissolved only where the suspension does not involve the making of a different contract between the parties. That is right. War does not create any contract. Apply that to the present case. This contract does not provide for performance of a future act or a series of disjointed acts, some immediate and others more remote. This contract involves the parties in a continuous relation involving efforts on both sides, of which the essence is continuity. To affirm such a contract as standing generally although at the present time and for an indefinite period it cannot be acted on is not to maintain the original contract, but to substitute a different contract for it. To say that the contractual obligations shall exist now and henceforth and to say that they cannot be performed now and that no one knows when they will become performable again is, having regard to the nature of the obligations in this case, a simple contradiction. The result is that, the war having interfered with the performance of this contract, the contract is dissolved.

The defendants based an argument upon the language of the "yearly quantities" clause. It was said that this clause shows that the parties have contemplated a suspension of the operation of this contract. It provides that "in the event that Messrs.

L. Possehl & Co., Lübeck, should not take this quantity of 3000 tons in any one year, no liability to attach to them for the quantities short taken further than the loss of the said control" ; that is said to mean that if the defendants do not take the yearly quantity in any year that year drops out of the contract and the obligations re-attach themselves in the following year. That contention is not sound. The clause does not provide for a suspension of the contract by inflicting a loss of control as the price of suspension and treating the contract as capable of resumption when the period of suspension is over. The loss of control contemplated in this clause is merely that which follows necessarily from taking less than the specified amount. So far from providing for a suspension, the clause imports that other obligations of the contract are to remain in force and be performed notwithstanding that the defendants take less than the yearly quantity. It deals only with one out of many important mutual obligations, leaving untouched those others which are to remain and be performed. It does not help the defendants over the insuperable difficulty in the way of treating this contract as capable of resumption after the war and so placing the parties in a position which they have not agreed to occupy. There must be judgment for the plaintiffs for the declaration as prayed.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Harrison, Powell & Tulk, for Brown, Auld & Brown, Whitehaven.*

Solicitors for defendants: *Lawrence Jones & Co.*

W. H. G.

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Feb. 28;
March 6.

In re BOOCOCK.

Bankruptcy—Payment by Bankrupt—Notice of Act of Bankruptcy—Inquiry—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *ss.* 37, 45.

At 3 P.M. on July 16 the respondents received information that a bankruptcy notice, which would expire at midnight on that day if not complied with, had been served on a man who was their debtor. On July 23 the debtor paid to the respondents a sum of money. The respondents did not at any time before receiving this payment make any inquiry as to whether the bankruptcy notice had been complied with. The bankruptcy notice had not in fact been complied with, and the debtor was subsequently adjudicated bankrupt:—

Held, that at the time of the payment the respondents had no notice of an act of bankruptcy or of any facts which put them on inquiry as to whether an act of bankruptcy had been committed, and that the payment was, therefore, not void as against the trustee in bankruptcy.

APPEAL from the Leeds County Court.

On July 9, 1914, a bankruptcy notice was served on one Boocock by a firm of Robinson Brothers in respect of the balance owing on a judgment debt. The time within which the notice could be complied with would expire at midnight on July 16. At 3 P.M. on July 16 Peter Walker & Son (Burton and Warrington), Limited, the respondents, in circumstances which are fully stated in the judgment of Horridge J., were informed of the service of the bankruptcy notice and that it had not at that time been complied with. On July 23 Boocock paid to the respondents 295*l.* 3*s.* 3*d.* in respect of a debt owing by him to them. The respondents did not at any time before receiving this sum make any inquiry as to whether the bankruptcy notice had been complied with. The notice had in fact not been complied with. On September 10, 1914, a receiving order was made against Boocock, on which he was adjudicated bankrupt on September 15, the act of bankruptcy being the non-compliance with the bankruptcy notice.

The trustee in bankruptcy applied to the county court judge for an order that the payment to the respondents was, having

regard to ss. 37 and 45 of the Bankruptcy Act, 1914 (1), void as against the trustee on the ground that at the time of the payment the respondents had notice of an available act of bankruptcy committed by the bankrupt before July 23.

The county court judge held that the respondents had not at the time of the payment notice of an available act of bankruptcy, and he therefore dismissed the application.

The trustee appealed.

Compston, K.C., and *F. Mellor* (*R. A. Shepherd* with them), for the appellant. In order to invalidate the payment to the respondents it is not necessary to prove that at the date of the payment the respondents had actual notice that an act of bankruptcy had been committed; it is sufficient if the respondents wilfully abstained from obtaining knowledge: *Bird* v. *Bass* (2); or if they knew of the existence of facts from which the inference might reasonably be drawn: *Smith* v. *Osborn* (3); *Ex parte Snowball.* (4) "The notice need only be such as to lead the person to inquire": *Brewin* v. *Briscoe* (5), per Crompton J. When the payment was made to the respondents by the bankrupt on July 23

(1) Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 37: "(1.) The bankruptcy of a debtor . . . . shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him . . . ."

Sect. 45: "Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment and with respect to the avoidance of certain settlements, assignments and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy—

"(*a*) Any payment by the bankrupt to any of his creditors;

. . . . .

"Provided that both the following conditions are complied with, namely—

"(i.) that the payment . . . . takes place before the date of the receiving order; and

"(ii.) that the person . . . . to . . . . whom the payment . . . . was made, ... has not at the time of the payment, ... notice of any available act of bankruptcy committed by the bankrupt before that time."

(2) (1843) 6 Man. & G. 143.

(3) (1858) 1 F. & F. 267.

(4) (1872) L. R. 7 Ch. 534.

(5) (1859) 28 L. J. (Q.B.) 329, 336.

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they knew that there must have been an act of bankruptcy unless the bankruptcy notice had been complied with before midnight on July 16, and they knew that so late as 3 P.M. on that day it had not been complied with. They had no reason for supposing that it had subsequently been complied with, and in the absence of any inquiry on the subject they must be taken to have had notice on July 23 of the act of bankruptcy. Supposing that instead of receiving the information as to the bankruptcy notice at 3 P.M. on July 16 they had heard of it five minutes before midnight on that day, the time at which it expired. Could it be said in that case that, before they received the money on July 23, they were not bound to inquire whether the bankruptcy notice had been complied with? The question must, therefore, be one of degree. The onus is on the respondents to prove that they received the payment without notice: *Ex parte Cartwright* (1); and in the circumstances they have not discharged that onus. [*In re Badham* (2) and *In re Slobodinsky* (3) were also referred to.]

Tindal Atkinson, K.C., and *G. Jordan*, for the respondents. In all the cases cited an act of bankruptcy had in fact been committed at the time the knowledge was obtained which was relied on as constituting notice. There is no authority for saying that knowledge of facts which may in a certain contingency lead to an act of bankruptcy is sufficient to put a creditor on inquiry at a later date as to whether an act of bankruptcy has in fact been committed. In *Evans* v. *Hallam* (4) it was held that a notice stating circumstances which might or might not amount to an act of bankruptcy was not sufficient. See also *In re Morgan*. (5) From the information given to the respondents on July 16 they were entitled to assume that the bankruptcy notice would be complied with.

Compston, K.C., in reply referred to *Edwards* v. *Gabriel*. (6)

Cur. adv. vult.

March 6. HORRIDGE J. read the following judgment:—The question raised by this appeal is whether a payment made by the

(1) (1881) 44 L. T. 883.
(2) (1893) 10 Mor. 252.
(3) [1903] 2 K. B. 517.
(4) (1871) L. R. 6 Q. B. 713.
(5) (1895) 2 Mans. 508.
(6) (1861) 30 L. J. (Ex.) 245; 31 L. J. (Ex.) 113.

bankrupt on July 23, 1914, of 295*l.* 3*s.* 3*d.* to the respondents was a payment made to a person who had not at the time of payment notice of an available act of bankruptcy committed by the bankrupt before that time. The learned county court judge accepted the facts as deposed to by Mr. Kenworthy, the solicitor for Messrs. Robinson Brothers, and his clerk Mr. Brearley. This account, if accepted in full, was that on the morning of July 16, 1914, Mr. Kenworthy informed the respondents by a telephonic message which was received by a person named Kerr that Boocock did not want the bankruptcy notice to be proceeded with as he did not owe any money except to Messrs. Robinson Brothers and Messrs. Peter Walker & Son, and that he had arranged to leave the public-house which he occupied (called the Fleece Inn, Armley) and was to receive between 400*l.* and 500*l.* from the incoming tenant, that he owed Messrs. Peter Walker & Son about 300*l.*, and that he stated Kenworthy's firm could draw the amount owing to their clients out of the moneys to be received by him, and Mr. Kenworthy stated that he informed Messrs. Peter Walker & Son that the bankruptcy notice expired on that day, but his clients had no desire to proceed with it if Boocock's statement was correct. The gentleman who answered the telephone said Mr. Spurr, who had the matter in hand, would not be in until 3 o'clock. About 3 o'clock Mr. Kenworthy again telephoned and repeated what he had said in the morning, and stated again that his firm had served a bankruptcy notice on Boocock which expired on that day, but that Robinson Brothers had no desire to proceed with the presentation of the petition if they could be satisfied that the money would be forthcoming, and Mr. Spurr informed him that Boocock would have something to draw, but could not say how much.

I have to consider whether these communications amounted to a notice of an available act of bankruptcy committed by the bankrupt. What amounts to notice of an act of bankruptcy is dealt with by Mellish L.J. in *Ex parte Snowball* (1), where he says: "If he is proved to have received a formal notice he is not allowed to escape from the effect of having had notice by saying he had not read it when he ought to have read it, or that he did not believe it when he had read it; and we think if he is proved to

(1) L. R. 7 Ch. 549.

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have known facts which were sufficient to have informed him that an act of bankruptcy had been committed, he cannot be allowed to escape from the effect of having had notice by saying he did not draw the natural inference from the facts."

It was contended before us, however, on behalf of the appellant that some of the authorities established that the payee was fixed with notice if the facts put him on inquiry and he could have found out as to the act of bankruptcy. In the judgment of Crompton J. in *Brewin* v. *Briscoe* (1) he uses the expression " The notice need only be such as to lead the person to inquire." In *Evans* v. *Hallam* (2) Cockburn C.J. says : " It is not notice of an act of bankruptcy to say something to him which might possibly put him to further inquiry ; it is not notice to tell him something which, if he were to inquire further, would show him that an act of bankruptcy did exist " ; but Blackburn J. in the same case says : " The matter to be ascertained in these cases is, whether sufficient information was given of those facts which amount to an act of bankruptcy, so as to make it reasonable for the execution creditor to hesitate in enforcing his judgment."

I do not think it is necessary in this case to decide whether or not a notice which in itself does not disclose facts showing an act of bankruptcy, but which might put a payee on inquiry, would be sufficient notice, as I do not consider the facts either gave notice of an act of bankruptcy having been committed, or put the respondents on inquiry. At 3 o'clock on July 16 there was no act of bankruptcy, and, therefore, there could at that time be no notice of any available act, but the way in which it was put on behalf of the appellant was that on July 23, when the payment was made, the respondents had knowledge of the facts which had been communicated to them on July 16, and that they ought either to have drawn the inference that the bankruptcy notice had become an act of bankruptcy or to have inquired as to whether or not it had. The bankrupt could have avoided the effect of the bankruptcy notice by either securing or compounding to the satisfaction of Messrs. Robinson Brothers during the afternoon of July 16, and they might have obtained security from the bankrupt by way of assignment of the moneys which were coming to him.

(1) 28 L. J. (Q.B.) 336. (2) L. R. 6 Q. B. 716, 717.

Further, the respondents, if they had thought about the matter, would have come to the conclusion that it was very much against the interests of Mr. Kenworthy and his clients to allow the notice to mature into an act of bankruptcy when the arrangement with Boocock was to be that both Messrs. Robinson Brothers and the respondents were to be paid out of the moneys to be received on the assignment of the tenancy.

Mr. Compston, for the appellant, relied strongly on the case of *Edwards* v. *Gabriel* (1), but in that case the effect of s. 76 of 12 & 13 Vict. c. 106 was to enact that in the case of a petition for adjudication of bankruptcy being filed an act of bankruptcy should be deemed to be committed as from the date of filing a prior petition for a private arrangement, and notice of the filing of such prior petition had in that case been clearly given.

I think there was no notice of any act of bankruptcy or notice of any facts which put the respondents on inquiry, and this appeal should, therefore, be dismissed.

ROWLATT J. I am of the same opinion. We have to deal with an Act of Parliament which speaks of notice of an act of bankruptcy. We are not concerned with inquiring as to what degree of knowledge or imputed knowledge is sufficient to raise an equity against another person within the doctrines of the Court of Chancery. It is quite clear that the notice need not be a formal intimation ; knowledge of the fact is enough ; and it is also quite clear from the authorities which have been cited that knowledge of facts which tell one of an act of bankruptcy is knowledge and notice of an act of bankruptcy. When a question arises as to whether the facts that are known are sufficient to tell the recipient of that knowledge of an act of bankruptcy, the question has to be decided upon a reasonable view of the facts in the particular case. Further, it is clear that a person cannot say he has no notice of an act of bankruptcy if he has shut his eyes to information which he must have known would, if he had kept his eyes open, have informed him of an act of bankruptcy. But in this case we are asked to say that a man has notice of an act of bankruptcy merely because he has not followed up the development of the situation which was created by the service of a

(1) 30 L. J. (Ex.) 245; 31 L. J. (Ex.) 113.

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bankruptcy notice of which he had knowledge, which bankruptcy notice without his knowledge in fact has subsequently matured into an act of bankruptcy. There is no decided case which goes anything like as far as that. Therefore I agree in the judgment which my learned brother has read.

Appeal dismissed.

Solicitors for appellant: *Jaques & Co., for Godfrey Rhodes & Evans, Halifax.*

Solicitors for respondents: *Ford & Ford, for Higham & Co., Manchester.*

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[IN THE COURT OF APPEAL.]

ASIATIC PETROLEUM COMPANY, LIMITED *v.* ANGLO-PERSIAN OIL COMPANY, LIMITED.

[1915 A. 720.]

Practice — Discovery — Documents — Privilege — Official Documents — Documents in Possession of Private Person—Production prejudicial to Public Interest—Order XXXI., *r.* 14.

The protection of documents from discovery upon the broad ground of State policy and public convenience is not limited to public official documents of a political or administrative character. The foundation of the rule is that the information cannot be disclosed without injury to the public interest, and not that the documents are confidential or official, which alone is no reason for their non-production.

Therefore, a copy of a letter written by the defendants, who owned a pipe line from the Persian oil fields to their refinery in the Persian Gulf, to their agents in Persia containing confidential information from the Board of Admiralty, with whom the defendants had a contract for the supply of fuel oil for His Majesty's ships, as to the progress of the campaign in Persia and as to the intentions of the authorities in reference thereto, such information having been given to the defendants for the purpose of assisting them in maintaining the supply of fuel oil and of keeping their agents properly instructed, was *held* privileged from inspection, the proper officer of the Admiralty having directed the defendants not to produce the letter upon the ground that its production would be detrimental to the interests of the State.

APPEAL from an order of Scrutton J. in chambers in an action in the commercial list.

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The action, shortly stated, was brought to recover damages (1.) for alleged breach of an agreement by the defendants to sell to the plaintiffs a cargo of crude oil f.o.b. the plaintiffs' steamship *Cardium* at Abadan in the Persian Gulf; and (2.) for having ordered the *Cardium*, when she arrived at Abadan on February 7, 1915, to receive the cargo, to proceed to Tarakan without having loaded the said cargo.

The defendants in their defence stated, as to the alleged non-delivery of crude oil, that the contract, if made, was a contract expressly or by implication for the supply of crude oil brought to Abadan by means of a pipe line laid from the oil-producing districts of Persia to the defendants' tanks at Abadan, and to the knowledge of the plaintiffs the whole of the crude oil from time to time received by the defendants at Abadan was obtained from the said districts by means of the said pipe line; that the defendants were, to the plaintiffs' knowledge, under contract to supply to divers persons, including the Admiralty, large quantities of crude oil or its derivatives to an extent that could only be fulfilled so long as a constant supply of crude oil was being delivered through the said pipe line; that accordingly it was an implied term and/or the substratum of the contract that the pipe line should continue to exist in a condition fit to carry and deliver crude oil; and that on or about February 5, 1915, and prior to the date for the delivery of the crude oil which had been sold by the defendants to the plaintiffs the pipe line was cut by native tribes believed to have been incited thereto by the King's enemies, and the defendants' supplies of crude oil were totally cut off during all material times, and the contract accordingly became impossible of performance and its substratum was destroyed. Further, or in the alternative, as to the alleged non-delivery, the defendants produced from crude oil delivered at Abadan large quantities of oil fuel for the use of His Majesty's Fleet, and the said crude oil and its derivative fuel oil were war material or warlike stores; and upon the interruption of the pipe line the defendants were directed by the Admiralty to reserve for the use of the Admiralty the whole of the crude oil then at Abadan, as the same might be required for conversion into fuel oil, the said directions having been given under the Defence of the Realm Acts and Regulations. The said non-delivery was due to the interruption of the

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pipe line and/or to the directions of the Admiralty. As to the alleged diversion of the steamship *Cardium*, the defendants denied that they caused the steamship to proceed to Tarakan, and alternatively, with a denial of liability, they brought into Court 2300*l.* as sufficient to satisfy the plaintiffs' claim in respect thereof.

The defendants by their secretary made an affidavit of documents, paragraph 4 of which was as follows: "The defendants have also in their possession two documents . . . . (i.) a contract made between the defendant company and the Board of Admiralty; (ii.) copy of a letter from the defendant company to their agents in Persia in the month of February, 1915," (the date of this letter was stated in the course of the argument to be February 12) "dealing with the progress of the campaign in Persia, and the policy, views, and intentions of the authorities including the said Board of Admiralty in relation thereto. I am informed by Mr. J. C. Clarke of the Navy Contracts Department of the Admiralty and believe that the said documents have been read and considered by the Secretary of the Admiralty, and the said Mr. J. C. Clarke has on behalf of the said Secretary of the Admiralty instructed the defendant company not to produce or disclose the said documents on the grounds, having regard to their confidential nature, of the interest of the State and of the possible assistance to the enemy should the contents thereof become known. In consequence of the said instructions the defendant company object to produce the said documents." Paragraph 5 was as follows: "With regard to the documents referred to in part 3 of the said schedule . . . . the defendant company object to produce and claim the right to seal up or otherwise cover up the portions indicated in the said part 3 of the said schedule. I am informed by the said Mr. J. C. Clarke and believe that the said documents have been read and considered by the Secretary of the Admiralty, and the said Mr. J. C. Clarke has on behalf of the said Secretary of the Admiralty instructed the defendant company not to produce or disclose the said portions of the said documents on the grounds that the said portions relate to the progress of the said campaign in Persia and the policy, views, and intentions of the authorities, including the said Board of Admiralty, in relation thereto, and to the position of the said Board with regard to their supplies of fuel oil, and that production or disclosure of

such portions of the said documents would accordingly be detrimental to the interests of the State and be of possible assistance to the enemy should the same become known."

The documents referred to in part 3 of the schedule were three cablegrams from Messrs. Strick, Scott & Co., the defendants' agents in Persia, to the defendants dated respectively February 7, 8, and 10, 1915.

The plaintiffs applied to Scrutton J. for an order that the defendants should give inspection of the documents referred to in paragraphs 4 and 5 of the affidavit of documents to the plaintiffs and their solicitors and permit them to peruse the same and to take copies thereof.

The secretary of the defendant company in opposition thereto made an affidavit in which he stated (paragraph 2) that the defendant company were large refiners of oil with a refinery at Abadan in the Persian Gulf, and were the owners of a pipe line for conveying crude oil from the Persian oil fields to Abadan, and as such refiners produced large quantities of fuel oil suitable for the use of His Majesty's Fleet; (paragraph 3) that in 1914 the Board of Admiralty, being desirous of ensuring an adequate supply of fuel oil for His Majesty's Fleet in times of war independent of the good will of neutral countries, procured that by a public and general statute (Anglo-Persian Oil Company (Acquisition of Capital) Act, 1914 (4 & 5 Geo. 5, c. 37)) the Treasury should be empowered to subscribe for share or loan capital of the company out of the public funds, and the Treasury accordingly did so subscribe to the amount of 2,000,000*l.*, and the interest of the Board of Admiralty in the company and its business was directly represented by two directors nominated by the Treasury; (paragraph 4) that at or about the time of the passing of the Act the Board of Admiralty entered into a contract with the defendant company for the supply of fuel oil in peace and in war, and this contract was one of the documents which he had been directed by the Secretary of the Admiralty to decline to produce; (paragraph 5) that the other documents the whole or part of which he had been directed to refuse to produce all passed at or about the time when the pipe line of the defendant company had been broken by hostile natives, and at the time when the campaign in Persia in the same neighbourhood was in progress,

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namely, in February, 1915, and by reason of the interest of the Board of Admiralty in the maintenance of a supply of fuel oil as aforesaid and by reason of the close association of the defendant company with the Board the defendant company from time to time received confidential information from the Board as to the progress of the campaign and as to the hopes and intentions of the authorities in reference thereto, and such information was given to the defendant company for the purpose of assisting them in maintaining the supply of fuel oil and to enable the defendant company to keep their local agents in Persia properly instructed; (paragraph 6) that the letter from the defendant company to their agents in Persia referred to in paragraph 4 of the affidavit of documents disclosed upon the face of it that it was in part a copy of confidential cablegrams sent to the India Office by their official representatives in Persia and disclosed by the India Office to the defendant company, and in part comments by the defendant company upon the information therein contained; and (paragraph 7) that the only portions of the cablegrams from Strick, Scott & Co. to the defendant company, dated February 7 and 10, 1915, respectively and not disclosed, set out the actual quantity of fuel oil available upon the said dates for the purpose of the Board of Admiralty.

Scrutton J. ordered that the application be adjourned to the judge at the trial, and gave leave to appeal. He made the following indorsement thereon: "I desire to state that having seen documents I think the Government may be right in the view that they ought not to be produced to others, and I will not take the responsibility of ordering them to be produced against the wishes of the Government."

The plaintiffs appealed.

March 6, 13. *Roche, K.C.*, and *Stuart Bevan*, for the plaintiffs. The rule is correctly stated in the Annual Practice, 1916, p. 513, that "public official documents are protected from disclosure if it would be injurious to the public interest" to disclose them. In Bray on Discovery, p. 547, the rule is stated in the same way. The documents of which inspection is asked in the present case are not public official documents in any sense. The privilege is limited to State documents whose publication would be injurious to the

public interest: *Hennessy* v. *Wright* (1); *Smith* v. *East India Co.* (2) The plaintiffs do not press for inspection of the agreement, which may be a State document. The letter from the defendants to their agents in Persia and the cablegrams from the agents to the defendants cannot be described as State or public official documents. The privilege only extends to a document in the possession of the Crown or of some person who receives it as an official of the Crown. The privilege is gone when the document is in the hands of a private person who communicates its contents to his agent or solicitor. There is no authority to the effect that a communication passing between a contractor with the Government and his agent is protected from discovery as a State document. The plaintiffs do not attach so much importance to the cablegrams, but the letter of February 12, which was sent a few days after the pipe line is alleged to have been cut, is most vital to the plaintiffs' case upon the question of the requisition by the Admiralty of the oil in the tanks at Abadan. It may show whether all the oil was requisitioned, or whether there was any real requisition at all. The cablegrams are clearly relevant to the issue whether the substratum of the contract was gone by reason of the pipe line being cut. That would depend upon the storage capacity of the tanks at Abadan and how much oil was stored there at the time. These documents are clearly relevant, and the plaintiffs are entitled to inspection of them, but in order to avoid any question of injury to the public interest the plaintiffs are willing that the inspection shall be by one member of the firm of solicitors who act for the plaintiffs and by the plaintiffs' junior counsel, and that no copy shall be taken.

In *Smith* v. *East India Co.* (2) the correspondence which was held to be privileged passed between the East India Company and the Government of India. It was official correspondence. The documents in the present case are not public official documents. They are therefore not privileged from production. The plaintiffs desire production now so that they may see what their position is. Production at the trial will be too late.

Sir John Simon, K.C., and *O'Hagan*, for the defendants. Under the provisions of the Anglo-Persian Oil Company (Acquisition of

(1) (1888) 21 Q. B. D. 509, 512, 513. (2) (1841) 1 Ph. 50.

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Capital) Act, 1914, the Government subscribed 2,000,000*l.* to the capital of the company and appointed two directors on the board, and thereby entered into the closest relations with the company. The Government has in due form directed the defendants not to produce the documents upon the ground that their production would be detrimental to the interests of the State. The learned judge, who saw the documents, refused to make an order for their production at the present stage of the proceedings. The rule is the same whether the document is in the possession of an official in the service of the Government or of a third person. The rule is that when the claim for protection is properly made protection ought to be given to documents the production of which would be against the public interest, whether the document is a public official document in the strict sense or not. With regard to the letter of February 12, 1915, which was written within a week of the pipe line being cut, it is clear from the second affidavit of the secretary of the defendant company that it is a copy of a confidential Government despatch and is privileged. With regard to the cablegrams, the parts claimed to be covered up may be supposed to give an estimate of the amount of the crude oil in the defendants' tanks at Abadan. They are obviously confidential documents production of which it has been sworn would be detrimental to the public interest. Moreover, disclosure of information as to the quantity of crude oil in the defendants' tanks at Abadan cannot be relevant to any issue in this action. No reason has been shown for interfering with the exercise by the learned judge of his discretion in refusing to order production of the documents at the present stage of the proceedings. The circumstances here are peculiar because a great war is in progress, and the Court will be careful before ordering production at such a time. There is no case where the privilege has been discussed in time of war.

Roche, K.C., in reply. The principle is the same in time of war as in time of peace, though in time of war there is power under the Defence of the Realm Regulations to stop undue publication of matter injurious to the interests of the State.

March 14. SWINFEN EADY L.J. This is an appeal from an order of Scrutton J. adjourning to the judge at the trial an applica-

tion by the plaintiffs for the production of certain documents. The defendants resist the application on the ground that their production would be against the public interest. [The Lord Justice stated the nature of the claim and of the defence and the circumstances stated above under which the Act of 1914 was passed.] The first document of which production is asked is the contract between the Board of Admiralty and the defendant company, but counsel for the plaintiffs do not now press for production of it. The other documents are a letter dated February 12, 1915, from the defendant company to their agents in Persia, and three cablegrams, dated February 7, 8, and 10, from the defendants' agents in Persia to the defendants. The plaintiffs are especially desirous of having the letter produced, and though they ask for production of the cablegrams they do not attach so much importance to them. It will be observed that all these documents passed within a few days of the cutting of the pipe line which is alleged to have taken place on February 5. In the affidavit of the secretary of the defendant company in opposition to the application for inspection the letter is dealt with in this way : [The Lord Justice read paragraphs 5 and 6 of the affidavit set out above.] In his original affidavit of documents the secretary of the defendant company said that the letter and the cablegrams had been considered by the Secretary of the Admiralty. [The Lord Justice read the latter part of paragraph 4 of the affidavit set out above, and said that a similar statement was made in paragraph 5 as to the cablegrams.] The proper officer of the Admiralty has therefore expressed an opinion to Mr. Clarke, who has informed the defendants of it, that these documents cannot be produced without prejudice to the public service and that in the public interest an order for their production ought not to be made.

It was urged by the plaintiffs that the rule protecting documents from discovery, on the ground that disclosure would be injurious to the public interests, was limited to State papers, reports, minutes, and other official documents or correspondence, and could not be held to extend to a letter from the defendants to their agents in Persia, or to cablegrams from the agents to the defendant company. Although the instances in which documents have been held to be protected from discovery on the broad principle of State

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policy and public convenience have usually been cases of public official documents of a political or administrative character, yet the rule is not limited to these documents. The foundation of the rule is that the information cannot be disclosed without injury to the public interests, and not that the documents are confidential or official, which alone is no reason for their non-production: *Smith* v. *East India Co.* (1); *Hennessy* v. *Wright.* (2)

If the production of the document would be injurious to the public service, the general public interest must be considered paramount to the individual interest of the suitor: *Beatson* v. *Skene.* (3) The learned judge from whom the present appeal is brought has himself perused the documents and expressed an opinion upon them, and refused to order production at this stage. We see no reason for overruling the discretion thus exercised. The question of production will arise again at the trial. Before that date the Board of Admiralty, or the Secretary of the Admiralty, will doubtless carefully consider—and should be prepared at the trial to say—whether any further discovery of the documents in question can be given without injuriously affecting the public interest, or whether some inspection cannot properly be given, limited as to the persons to whom given, and upon satisfactory assurances with regard to the information being treated as confidential and not to be further disclosed. But this is a matter for the Board of Admiralty or the Secretary to consider.

BANKES L.J. I agree.

Appeal dismissed.

Solicitors for plaintiffs: *Waltons & Co.*

Solicitors for defendants: *Ashurst, Morris, Crisp & Co.*

(1) 1 Ph. 50. (2) 21 Q. B. D. 509.
(3) (1860) 5 H. &. N. 838, 853.

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[IN THE COURT OF APPEAL.]

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LEWIS *v.* HUGHES.

[1915 L. 507.]

Licensed Premises—Lease—Increase of Licence Duty—Distribution of Payments between Lessor and Lessee—Right of Lessee to recover Proportion from Lessor—Repeal of Act—"Right accrued"—"Contrary Intention"—Interpretation Act, 1889 (52 & 53 *Vict. c.* 63), *s.* 38—*Finance Act*, 1912 (2 & 3 *Geo.* 5, *c.* 8), *s.* 2—*Finance* (*No.* 2) *Act*, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 18.

By s. 38, sub-s. 2, of the Interpretation Act, 1889, where any Act passed after the commencement of that Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not affect any right or privilege acquired or accrued under any enactment so repealed.

By s. 2 of the Finance Act, 1912, where licensed premises are held under a lease made before the passing of the Finance (1909-10) Act, 1910, which does not contain or import any covenant, agreement, or undertaking on the part of the lessee to obtain a supply of intoxicating liquor from the grantor of the lease, the lessee shall be entitled to recover as a debt due from, or deduct from any sum due to, the grantor of the lease so much of any increase of the duty payable in respect of the licence under the Finance (1909-10) Act, 1910, as may be agreed upon as proportionate to any increased rent or premium payable in respect of the premises being let as licensed premises, and, in default of agreement, the amount shall be determined by a county court.

By s. 18 of the Finance (No. 2) Act, 1915, "section two of the Finance Act, 1912, ... shall cease to have effect and is hereby repealed, without prejudice to the validity of any payments made in pursuance of that section before the passing of this Act."

Before the passing of the Finance (No. 2) Act, 1915, the defendant, who was tenant to the plaintiff of licensed premises under a lease made before the passing of the Finance (1909-10) Act, 1910, claimed to deduct under s. 2 of the Finance Act, 1912, from the rent due under the lease the proportion of the increase of the licence duty paid under the provisions of the Act of 1910, and proceedings were taken in the county court to determine the amount. These proceedings were pending at the date of the passing of the Act of 1915. The lessor contended that s. 18 of the Act of 1915 had taken away any right which the lessee had under s. 2 of the Act of 1912 to make the deduction claimed :—

Held, that s. 18 of the Act of 1915 did not show an intention to take away rights already accrued to the lessee under s. 2 of the Act

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of 1912, and that therefore, as no "contrary intention" appeared in that section, s. 38 of the Interpretation Act, 1889, applied, and preserved those rights to the lessee.

APPEAL from an order of Lord Coleridge J. in chambers.

The plaintiff, who was the rector of Merthyr Tydfil, was as such the tenant for life of certain glebe lands upon which were two fully-licensed hotels, called respectively the Castle Hotel and the Vulcan Hotel. By two indentures of lease each dated March 1, 1906, the plaintiff, with the consent of the patron of the parish of Merthyr Tydfil and of the bishop of the diocese, demised the hotels to the defendant for the term of ninety-nine years from January 1, 1906, at the respective rents of 350*l.* and 200*l.* per annum payable quarterly. Each of the leases contained a proviso for re-entry on non-payment of rent for twenty-one days after the same became due. Neither of the leases contained or imported any covenant, agreement, or undertaking on the part of the defendant to obtain any supply of intoxicating liquor from the plaintiff. On March 11, 1915, there being then two quarters' rent in arrear for more than twenty-one days in respect of each of the hotels, the plaintiff issued a specially indorsed writ to recover possession of the hotels and the two quarters' rent in arrear. Upon an application for judgment under Order XIV. the defendant admitted that he was indebted to the plaintiff in the sum indorsed on the writ, but he set up a right under s. 2 of the Finance Act, 1912, to deduct from the rent due from him to the plaintiff the proportion for a certain number of years of the increase of the licence duty paid in respect of the licences under the provisions of the Finance (1909-10) Act, 1910, which was chargeable to the plaintiff as lessor, alleging that such proportion exceeded the amount of the rent due. The amount to be deducted being disputed, the Master made an order on June 11, 1915, "that all further proceedings herein be stayed pending the assessment of the amount recoverable by the defendant Hughes from the plaintiff under the Finance Act, 1912, s. 2, the defendant Hughes undertaking to apply forthwith to the county court for the assessment of the amount recoverable under the said Act. Liberty to apply."

The defendant accordingly took proceedings in the county court to have the amount of the deduction determined, and on August 18, 1915, the county court judge determined the annual

amount which the defendant was entitled to deduct in respect of each of the hotels. On November 26, 1915, the Divisional Court set aside the order of the county court judge and directed a new trial upon the ground of the wrongful rejection of evidence. On December 23, 1915, before the new trial came on for hearing in the county court, the Finance (No. 2) Act, 1915 (1), was passed and came into operation, and s. 18 repealed s. 2 of the Finance Act, 1912. The plaintiff thereupon applied to the Master to set aside the stay granted on June 11 and to give leave to the plaintiff to sign final judgment in the action, upon the ground that the defendant's rights under s. 2 of the Finance Act, 1912, had ceased to exist. The Master refused the application, and Lord Coleridge J. affirmed the order. The plaintiff by leave appealed.

Wootten, for the plaintiff. Apart from s. 38 of the Interpretation Act, 1889 (2), when a statute is repealed the effect of the repeal is that stated by Lord Tenterden C.J. in *Surtees* v. *Ellison* (3): "It has been long established that, when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed." The transaction in

(1) 5 & 6 Geo. 5, c. 89, s. 18: "Section two of the Finance Act, 1912 (which relates to the distribution of payments on account of liquor licence duties in certain cases) shall cease to have effect and is hereby repealed, without prejudice to the validity of any payments made in pursuance of that section before the passing of this Act."

(2) 52 & 53 Vict. c. 63, s. 38, sub-s. 2: "Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not—

"(*a*) revive anything not in force or existing at the time at which the repeal takes effect; or

"(*b*) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed; or

"(*c*) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed; or

. . . . .

"(*e*) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability . . . . as aforesaid;

and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced . . . . as if the repealing Act had not been passed."

(3) (1829) 9 B. & C. 750, 752.

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the present case was not past and closed when s. 2 of the Finance Act, 1912, was repealed, as the amount had not been determined by the county court. At common law the defendant's rights under s. 2 of the Finance Act, 1912, would have been wholly destroyed by the repeal of that section. Sect. 38 of the Interpretation Act, 1889, has, however, altered the common law, and it provides in sub-s. 2 that, "unless the contrary intention appears," the repeal shall not "(*c*) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed." A "contrary intention" appears in s. 18 of the Finance (No. 2) Act, 1915, the repealing section. The words of s. 18, "shall cease to have effect and is hereby repealed," show that the intention of the enactment was to annul all then pending rights under s. 2 of the Act of 1912. The subsequent words, "without prejudice to the validity of any payments made in pursuance of that section before the passing of this Act," support this view. Unless the preceding words operate as an absolute repeal, those subsequent words are surplusage, because they add nothing to the provisions of s. 38 of the Interpretation Act, 1889. Moreover, the express exception from repeal of payments made in pursuance of the section before the passing of the Act shows that nothing else is preserved. The Legislature intended to preserve one class of rights alone, and it is difficult to give any reason for the insertion of those words unless it was intended to repeal absolutely all other classes of rights.

Secondly, this is not a right acquired or accrued within s. 38, sub-s. 2 (*c*), of the Interpretation Act, 1889. The right under s. 2 of the Finance Act, 1912, is a right to receive a sum of money the amount of which has to be agreed or determined by proceedings in the county court. The amount has not been agreed or determined by the county court. There was something to be done before the right to deduct came into existence: *Roberts* v. *Potts*. (1)

Barrington-Ward, for the defendant. There is no "contrary intention" appearing in s. 18 of the Finance (No. 2) Act, 1915, so as to exclude the operation of s. 38 of the Interpretation Act, 1889. The words in s. 18 "shall cease to have effect" refer to the future. Vested rights are not interfered with. The words "without prejudice to the validity of any payments made in pursuance

(1) [1894] 1 Q. B. 213.

of " s. 2 of the Finance Act, 1912, refer to payments to the Inland Revenue and mean without prejudice to rights arising in respect of payments made to the Inland Revenue. But whatever may be the meaning of those words, clear words are necessary to take away vested rights. Sect. 18 of the Act of 1915 does not clearly take away vested rights, and that being so, no "contrary intention" appears, and s. 38, sub-s. 2 (*b*), (*c*), preserves the right to make the deductions claimed. In *Roberts* v. *Potts* (1) the giving of the specified notice was a condition precedent to the right of the occupier to deduct the rates which he had paid from payments due from him to the landlord. In the present case the ascertainment of the amount is not a condition precedent to the right to deduct accruing.

Wootten in reply. "Payments" in s. 18 of the Act of 1915 does not mean payments to the Inland Revenue; it means the distribution of payments between the grantor of a lease and the lessee under s. 2 of the Act of 1912.

SWINFEN EADY L.J. stated the facts and continued: It is contended on behalf of the plaintiff that the right which the defendant had under s. 2 of the Finance Act, 1912, to recover from the plaintiff a proportionate part of the increase of the licence duty or to deduct it from the rent due has been taken away by s. 18 of the Finance (No. 2) Act, 1915, and is no longer in existence; that therefore nothing remains for adjudication in the county court; and that there is no longer any reason for the stay of proceedings in the action. If the plaintiff is right in that contention it is not disputed that he is entitled to judgment in the action. Nor, on the other hand, is it disputed that, if the right which the defendant had before the passing of the Act of 1915 is preserved to him, he is entitled to deduct from the rent due the proportionate amount of the increase of the licence duty as determined by the county court. Has he lost that right by reason of the repeal of s. 2 of the Act of 1912 by s. 18 of the Finance Act, 1915? The Master and the judge have held that he has not.

Sect. 18 says that s. 2 of the earlier Act "shall cease to have effect and is hereby repealed." It is necessary to turn to s. 38 of the Interpretation Act, 1889, for the purpose of seeing what is the effect

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of the repeal. That section says that " unless the contrary intention appears, the repeal shall not . . . . (*c*) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed." The defendant says that he has a right or privilege acquired or accrued which entitles him to deduct from the rent due the proportionate part of the increase of the licence duty, that proceedings are pending to determine the amount, and that he is entitled to enforce that right notwithstanding the repeal of the section inasmuch as no " contrary intention " is shown in the repealing section. The question we have to determine is whether such a contrary intention is shown.

Reliance is placed by the plaintiff on the words in s. 18 of the Act of 1915, " shall cease to have effect." I am unable to attach to those words the extended meaning claimed for them. When an Act is repealed it ceases to have effect. The words do not, in my view, indicate any contrary intention so as to exclude the provisions of s. 38 of the Interpretation Act, 1889. Then the succeeding words are relied upon as also showing a contrary intention, " without prejudice to the validity of any payments made in pursuance of that section before the passing of this Act." It is difficult to see that any further meaning is intended by those words than to protect payments already made. It is said on behalf of the defendant that they mean without prejudice to any rights arising from payments made to the Inland Revenue before the passing of the Act, but that cannot be so because the payments made in pursuance of s. 2 of the Finance Act, 1912, are not payments to the Inland Revenue, but are payments made in respect of the distribution between the grantor of a lease and the lessee of payments already made to the Inland Revenue on account of licence duties. The only safe course is to say that, whatever may be the meaning of the words, they do not convey any " contrary intention " so as to take away rights already vested under s. 2. The case of *Roberts* v. *Potts* (1) is distinguishable from the present. There the required notice was a condition precedent to the right of the occupier to deduct the rates paid on the tithe rent-charge from the rent. In the present case it was not a condition precedent to the vesting of the right that the amount should have been determined. A

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" contrary intention " does not appear in s. 18 of the Act of 1915, and there is no reason why the proceedings to ascertain the amount of the deduction which were pending in the county court when the repealing enactment was passed should not proceed. The appeal fails.

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PICKFORD and BANKES L.JJ. agreed.

Appeal dismissed.

Solicitors for plaintiff: *Bell, Brodrick & Gray, for Lewis Jones & Co., Merthyr Tydfil.*

Solicitors for defendant: *Pritchard, Englefield & Co., for W. B. Francis & Cooke, Cardiff.*

W. F. B.

LONDON COUNTY COUNCIL *v.* WILSON'S EXECUTORS.

1916 *March* 14.

Housing of the Working Classes—Scheme—Taking of Land compulsorily—Date at which Value is to be assessed—Housing of the Working Classes Act, 1890 (53 & 54 *Vict. c.* 70), *ss.* 7, 20, 21; *Sched. II.*

Where under a scheme made under the Housing of the Working Classes Act, 1890, land is taken compulsorily, the date at which the arbitrator has to ascertain its value is not the date of the advertisement of the scheme under s. 7 of the Act. Whether the proper date for assessing the value is the date of the arbitration or, if a notice to treat has been served, the date of that notice, *quaere*.

Wilkins v. *Birmingham Corporation* (1883) 25 Ch. D. 78 considered.

AWARD stated in the form of a special case.

An improvement scheme having been made by the London County Council (hereinafter called " the Council ") under Part I. of the Housing of the Working Classes Act, 1890, for Tabard Street, Grotto Place, and Crosby Row areas, the Council in December, 1910, caused advertisements of the scheme to be issued pursuant to the provisions of s. 7 (*a*) of the Act, and on December 20, 1910, they served upon the executors of Charles Eustace Wilson (hereinafter called " the claimants "), who were owners in fee simple of certain lands included in the area affected by the scheme, the notice required by sub-s. (*b*) of that section. The notice stated (inter alia)

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that a petition was about to be presented by the Council to the Local Government Board praying for an order confirming the scheme, and it called upon the claimants to state whether they did or did not dissent in respect of the taking of their lands.

In December, 1910, there were ten houses on the land belonging to the claimants which were let out on weekly tenancies to members of the working class, and up to November, 1910, there had been no difficulty in letting them.

Subsequently to the service of the notice of December 20, 1910, the claimants experienced great and increasing difficulty in letting the premises and in collecting the rents due from such tenants as they succeeded in obtaining or retaining. No rents were actually received by the claimants in respect of the premises after November, 1911, but certain of the tenants remained in possession without paying rent for some time after that date. The last of the tenants quitted the premises some time in the summer of 1912, and from that date the premises were left wholly unoccupied. It was contended by the claimants that the difficulty which they experienced in letting the premises after November, 1910, was due to the publication of the scheme and to the fact that it had become known in the neighbourhood that the Council were applying for powers to enable them to demolish houses within the Crosby Row area.

In accordance with the notice of December 20, 1910, the Council presented a petition to the Local Government Board praying for an order confirming the scheme. On March 13, 1912, the Local Government Board made the confirming order, and by notice dated April 23, 1912, and served on the claimants on May 18, 1912, the Council gave notice to the claimants that the order had been made.

In August, 1912, whilst the said premises were unoccupied they were broken into by unauthorized persons who wrought great damage thereto by removing the staircases, floors, doors, and rafters, and generally the whole of the interior woodwork and fittings, and the said premises were in consequence reduced to a dangerous condition. Dangerous structure notices under the London Building Act were thereupon served by the Council upon the claimants requiring them to pull down the buildings upon the premises and to board them in, and on August 12, 1912, orders were made by

a magistrate directing the claimants to execute the works mentioned in those orders. Thereupon the buildings were taken down to the first floor and subsequently demolished.

On October 10, 1912, the Council served upon the claimants notice that it was willing to negotiate with a view to agreement with the claimants as to the compensation to be paid to them in respect of the premises and their several interests therein, and with such notices were enclosed forms of claim to be filled in by the claimants and returned to the Council. On November 15, 1912, the claimants sent in their formal claim to the Council and thereby claimed the sum of 1350*l.* "for value of freehold site of the said premises."

No agreement was arrived at between the Council and the claimants as to the amount of compensation payable to the claimants, but the Council did not in fact apply to the Local Government Board pursuant to the provisions of the Housing of the Working Classes Act, 1890, for the appointment of an arbitrator to deal with disputed claims for compensation until September 11, 1914. Between the end of 1910 and September 11, 1914, the claimants had from time to time protested to the Council against what they alleged to be their undue delay in proceeding with the promotion of their scheme and (after confirmation thereof by the Local Government Board) in acquiring the premises, and they complained of the damage which they alleged that they were thereby sustaining. The Council contended that there had been no undue delay on their part and that they were not for divers reasons in a position to apply for the appointment of an arbitrator until September, 1914. The arbitrator was duly appointed on November 9, 1914.

The Council and the claimants attended by their respective counsel on February 24, 1915, before the arbitrator, who heard and considered the evidence and arguments laid before him, and after hearing the evidence he personally viewed the premises in question. At the date of the hearing the premises were only a vacant site, the buildings which had previously stood thereon having been completely demolished some time previously.

It was contended on behalf of the Council that, having regard to the provisions of s. 21 (i.) (*a*) of the Act of 1890, the arbitrator ought in assessing the compensation to proceed upon the basis

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that the value of the premises to which the claimants were entitled was the value which attached to them at the date of the arbitration, that is to say, in February, 1915.

It was contended by the claimants that the value to which they were entitled was the value of the premises in December, 1910, that is to say, either at the date of the advertisement of the scheme, or alternatively at the date when the notice was served by the Council under s. 7 (*b*) of the Act of 1890.

The arbitrator was of opinion that, having regard to the terms of s. 21 (i.) (*a*) of the Housing of the Working Classes Act, 1890, he was bound to proceed upon the basis that the value to which the claimants were entitled was the value of the premises at the time when the valuation thereof was made by him, that is to say, at the date of the arbitration in February, 1915.

If however, he was not so bound, he was of opinion that the proper basis was the value of the premises either at the date of the service of the notice of October 10, 1912, or at the date of the service of the notice on May 18, 1912, and that in any event he could not take an earlier date than the date of the order confirming the said scheme, namely, March 13, 1912. He, however, came to the conclusion on the evidence that at none of these dates in 1912 and 1915 had the premises any value except as a site, and that their value as a site was substantially the same at all four of the said dates.

The question for the opinion of the Court was whether in assessing the compensation payable to the claimants the arbitrator was bound in point of law to proceed upon the basis that the value to which the claimants were entitled was the value of the premises (*a*) in December, 1910, (*b*) on March 13, 1912, (*c*) on May 18, 1912, (*d*) on October 10, 1912, or (*e*) in February, 1915.

Subject to the opinion of the Court on the above question he awarded that 500*l.* was the amount to be paid by the Council to the claimants as compensation for all their interest.

Should the Court be of opinion that the value to which the claimants were entitled was the value of the premises as at any of the dates (*b*), (*c*), (*d*), or (*e*) referred to above the award was to stand, but should the Court be of opinion that the value to which the claimants were entitled was the value of the premises in December, 1910, he awarded to the claimants 957*l.*

Colam, *K.C.*, and *Fortune*, for the claimants. The question turns on the construction of certain sections of the Housing of the Working Classes Act, 1890. By s. 7 of that Act, as amended by s. 5 of the Housing of the Working Classes Act, 1903, upon the completion of an improvement scheme the local authority are required to publish during three consecutive weeks an advertisement stating the fact of the scheme having been made, the limits of the area affected, and where a copy of the scheme may be seen; and during the thirty days next following the date of the last publication of the advertisement the local authority must serve a notice on every owner and occupier of any lands proposed to be taken compulsorily, stating that such lands are proposed to be taken compulsorily for the purpose of the scheme, and in the case of any owner or lessee requiring an answer stating whether he dissents or not in respect of the taking of his lands. By s. 20 (1) the provisions of the Lands Clauses Act as to the purchase and taking of lands otherwise than by agreement are not, except to the extent set forth in the Second Schedule, to apply to any lands taken in pursuance of Part I. of the Act. Sect. 21 (2), on its true construction, shows that the arbitrator

(1) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 20: "The clauses of the Lands Clauses Acts, with respect to the purchase and taking of lands otherwise than by agreement shall not, except to the extent set forth in the Second Schedule to this Act, apply to any lands taken in pursuance of this part of this Act, but save as aforesaid the said Lands Clauses Acts, as amended by the provisions contained in the said schedule, shall regulate and apply to the purchase and taking of lands, and shall for that purpose be deemed to form part of this part of this Act in the same manner as if they were enacted in the body thereof; subject to the provisions of this part of this Act and to the provisions following; that is to say,

"(i.) This part of this Act shall authorise the taking by agreement of any lands which the local authority may require for the purpose of carrying into effect the scheme . . . . but it shall authorise the taking by the exercise of any compulsory powers of such lands only as are proposed by the scheme . . . . to be taken compulsorily . . . ."

(2) Sect. 21: "(1.) Whenever the compensation payable in respect of any lands or of any interests in any lands proposed to be taken compulsorily in pursuance of this part of this Act requires to be assessed—

"(*a*) the estimate of the value of such lands or interests shall be based upon the

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was wrong in rejecting the claimants' contention that the date of the publication of the advertisement under s. 7 is the date at which the value of the land is to be assessed. The effect of clause (*b*) of s. 21 is to crystallize the rights of the parties at the date of the advertisement, for it provides that no alteration of the property, except additions or improvements necessary for its maintenance in a proper state of repair, is to be taken into account. That the date of the publication of the advertisement is the proper date at which the value is to be assessed is the view taken in Cripps' Law of Compensation, 5th ed., p. 322, where *Wilkins* v. *Birmingham Corporation* (1) is cited in support of the proposition. In that case Mathew J., sitting as a judge of the Chancery Division, dealt with a claim for compensation under the Artisans' and Labourers' Dwellings Improvement Act, 1875, s. 19 of which is in practically identical terms with ss. 20 and 21 of the Act of 1890, and he held that the

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fair market value, as estimated at the time of the valuation being made of such lands, and of the several interests in such lands, due regard being had to the nature and then condition of the property, and the probable duration of the buildings in their existing state, and to the state of repair thereof, without any additional allowance in respect of the compulsory purchase of an area or of any part of an area in respect of which an official representation has been made, or of any lands included in a scheme which, in the opinion of the arbitrator, have been so included as falling under the description of property which may be constituted an unhealthy area under this part of this Act; and

"(*b*) in such estimate any addition to or improvement of the property made after the date of the publication in pursuance of this part of this Act of an advertisement stating the fact of the improvement scheme having been made shall not (unless such addition or improvement was necessary for the maintenance of the property in a proper state of repair) be included, nor in the case of any interest acquired after the said date shall any separate estimate of the value thereof be made so as to increase the amount of compensation to be paid for the lands . . . ."

(1) 25 Ch. D. 78.

publication of a requisition under s. 6 of the schedule to the Act of 1875 was analogous to a notice to treat under the Lands Clauses Act and that the value was to be ascertained as at the date of that requisition. Under the Lands Clauses Act a person is entitled to enhance the value of his property till a notice to treat has been served upon him, but in the Act of 1890 it is in terms provided that no enhancement subsequent to the date of the advertisement shall be taken into account. Adopting Mathew J.'s construction that the Lands Clauses Act is incorporated in the Act of 1890, that which is equivalent or analogous to a notice to treat under this Act is the advertisement and the notice following thereon under s. 7. The Council's contention that the value is to be ascertained as at the date of the award is not reconcilable with the provisions of s. 21 (*b*).

In any view the award is contradictory on its face and cannot stand inasmuch as the arbitrator has found that the value of the claimants' interest was the same on March 13, 1912, when the houses were standing, and on the later dates when the site was cleared of all buildings.

Morten, K.C., and *Jeeves*, for the Council. The provision in s. 7 of the Act of 1890 as to the publication of an advertisement of the scheme is in accordance with the invariable practice followed in local Acts. Neither the advertisement nor the notice to owners and occupiers following thereon has any analogy to a notice to treat under the Lands Clauses Act. Until the scheme is confirmed by the Local Government Board there is no binding obligation on the local authority to do anything. In *Wilkins* v. *Birmingham Corporation* (1) Mathew J. decided that the requisition under the Artisans' and Labourers' Dwellings Improvement Act, 1875, was analogous to a notice to treat under the Lands Clauses Act, and even assuming that he was right in holding that the Lands Clauses Act was incorporated in the Act before him, the earliest date at which the claimants can say the value should be assessed is the date of the notice to treat, namely, October 10, 1912. The date certainly cannot be the date of the advertisement, for if the claimants are right in their contention s. 21 (*b*) of the Act of 1890 would have been quite superfluous. The value is to be assessed as at the date of the award or at earliest

(1) 25 Ch. D. 78, 81.

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the date of the notice to treat, and in this case it is immaterial which of those dates is taken, as the arbitrator, on the evidence before him, has found that the value was the same on each of those dates.

Colam, K.C., in reply. A notice to treat is not provided for by the Act of 1890; the notice to treat served by the Council was therefore of no effect. If Mathew J. in *Wilkins* v. *Birmingham Corporation* (1) had had this Act to construe he would not have had to seek an analogy to a notice to treat under the Lands Clauses Act, as he would have had s. 21 (*b*) of the Act of 1890, which clearly implies that the date of the advertisement is the date at which the value is to be assessed.

ATKIN J., after referring to the provisions of the Housing of the Working Classes Act, 1890, continued: If I had to construe s. 20 of the Act apart from authority I should be inclined to the view that the clauses of Sched. II. were intended to form a complete code on the purchase and taking of land for the purposes of the Act otherwise than by agreement and that the provisions of the Lands Clauses Act as to taking land otherwise than by agreement were meant to be excluded entirely. I have, however, been referred to the case of *Wilkins* v. *Birmingham Corporation* (1), where in a question arising in an arbitration under the Artisans' and Labourers' Dwellings Improvement Act, 1875, Mathew J., in construing a section which for this purpose is in the same terms as s. 20 of the Act of 1890, said this: "I think it was meant that we should turn to the schedule and see how far the Lands Clauses Act was displaced by the schedule, and so far as it was not displaced it was intended that the Lands Clauses Act should be incorporated with the Dwellings Improvement Act." I feel bound to follow that opinion, and I shall assume, therefore, that to be the right construction of the Act of 1890.

In this case the London County Council prepared an improvement scheme in 1910, and, in accordance with s. 7 of the Act of 1890, they published the necessary advertisement and served notice upon the claimants. On March 13, 1912, an order confirming the scheme was made by the Local Government Board. Up to

(1) 25 Ch. D. 78, 81.

that date the Council had no rights in respect of the area included in the scheme; they had no power to take the land compulsorily; they could have abandoned the scheme altogether, or the Local Government Board might have refused to confirm it. In October, 1912, the Council, apparently accepting the view that the Lands Clauses Act applied, served the claimants with a notice to treat in ordinary form, and the claimants sent in a claim on November 15, 1912. In September, 1914, the Council applied for the appointment of an arbitrator; on November 9, 1914, the arbitrator was appointed; and in February, 1915, the arbitration was held, the question therein being as to the amount of compensation to which the claimants were entitled.

Before the arbitrator and before me the argument has been directed to the question at what date the valuation of the claimants' interest is to be made. The claimants contend that the material date is the date when the advertisement of the scheme was published in pursuance of s. 7 (*a*) of the Act of 1890, namely, in December, 1910. Other dates were suggested, but the arbitrator has found that as to all those subsequent dates the value was the same, and, subject to a point in respect of one of these dates, I shall assume that to be the fact. The dates which the arbitrator has taken are March 13, 1912, the date of the confirming order; May 18, 1912, the date of the notice that a provisional order had been made; October 10, 1912, the date of the notice to treat; and February, 1915, the date of the arbitration. What happened was this: After the notice under s. 7 (*b*) which was served on December 20, 1910, the claimants had great difficulty in letting the premises and in collecting the rents from the tenants. They received no rent after November, 1911, and the last of the tenants was turned out in the summer of 1912. In August, 1912, while the premises were unoccupied, they were broken into by trespassers, who removed staircases, &c., and reduced the premises to a dangerous condition; thereupon a dangerous structure notice was served, and thereafter an order was made for the premises to be pulled down. After August, 1912, nothing was left but the walls up to the first floor. As I have said, the arbitrator has found that the value of the property at all dates on and after March 13, 1912, was the same. Mr. Colam contends that the arbitrator could not properly so find because

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on March 13, 1912, the houses were in situ, whereas in October, 1912, they had been pulled down. I, however, see no difficulty in saying that the arbitrator's findings on this point may be quite reasonable in view of the locality of the premises and the fact that, although the property was occupied, it was by tenants who were not paying rent; in other words, that the houses, which were practically unlettable, were of no real value, and that the only value was that of the site. On that ground, therefore, I see no objection to the award.

The arbitrator has further held that the claimants are not entitled to the value of the premises as in 1910, the date contended for by Mr. Colam. In *Wilkins* v. *Birmingham Corporation* (1), as I have said, Mathew J. was considering an Act where the language of the material section was the same as in this Act, although the language of the schedule was not quite the same as in this Act, and having to determine at what date the interests which had to be assessed had to be in existence, he held that the date to be taken was the date of the publication of the requisition under the schedule, which he considered to be analogous to a notice to treat under the Lands Clauses Act. He said this: "Now, in the schedule we find provisions for something closely analogous to the notice to treat. Those provisions are contained in s. 6, sub-s. (*c*), of the schedule. I do not propose to go through the sections of the Act with regard to which there has been no controversy, and which relate to the preliminary steps to be taken by the local authority up to the time when the confirming Act has been obtained. When that Act has been obtained the right of the local authority to take the land described in the scheme is finally established, and what is the next step which they are to take? Apparently they are in the position of a railway company which has acquired parliamentary powers, their powers being to clear a certain area and for that purpose to acquire a certain right to it. Now when we refer to s. 6, sub-s. (*c*), of the schedule the next steps to be taken, so far as the owner of the property is concerned, are these. The local authority is to publish 'a requisition directing the owners of or parties by this Act enabled to sell and convey or release any of the said scheduled lands, or any lands injuriously affected by the execution of the scheme of

(1) 25 Ch. D. 78, 81.

the local authority or any interest in such lands, to deliver to the arbitrator on or before a day fixed by the arbitrator and named in such requisition (and being a day not earlier than twenty-one days from the date of the insertion of the last of such notices), a short statement in writing of the nature of their respective claims.' That provision seems to me distinctly analogous to the provisions of the Lands Clauses Act with regard to a notice to treat." Then, after dealing with the matter before the arbitrator, he continued: "I have come to the conclusion that the plaintiff is not in any way entitled to the relief which he asks. He is not entitled to compensation on the footing that he had acquired this leasehold interest. It may be that the rights of the parties were concluded at an earlier period than that of the notice contemplated by s. 6 of the schedule, but at any rate, dealing as I best can with this somewhat complicated legislation, it appears to me that this section has a distinct analogy to s. 18 of the Lands Clauses Act, and that from the time of the publication of the requisition the parties were concluded." In that case the claimant had acquired his interest after the date of the requisition and Mathew J. held that he was not entitled to claim compensation. On the section as drawn I do not think I should have come to the same conclusion as Mathew J. The words in s. 21 of the Act of 1890, which is in the same terms as the latter portion of s. 19 of the Act of 1875 which was construed by Mathew J., as to the value of the lands or interests being estimated at the time of the valuation being made, I should read as referring to the time of the final and conclusive valuation being made by the arbitrator in the case of a dispute, because that is the only time at which any valuation under the Act is being made. But although Mathew J. had those words before him he did not so construe them; he said they had relation to some other period, namely, to the date of a notice somewhat analogous to a notice to treat, and I think I am bound to follow his construction. Doing so, what was there in the present case analogous to a notice to treat? Mr. Colam says that it is the advertisement first given of the intention to form an improvement scheme. I cannot accept that. It seems to me to have no analogy to a notice to treat which is given after compulsory powers are acquired and are binding upon the parties. Advertisements are given in a great number of cases where notices to treat are

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subsequently given. In fact a notice to treat was given in this case. In Mathew J.'s view that the provisions of the Lands Clauses Act as to the acquisition of land otherwise than by agreement are applicable, the notice to treat was properly given, and on Mathew J.'s view the date of that notice would be the date to be taken for ascertaining the value of the property. Assuming that the date of the notice to treat—October 10, 1912—is for this purpose the correct date, the award is perfectly right. Mr. Colam contends that the provisions of s. 21 (*b*) are conclusive to show that the date of the advertisement is the proper date to be taken. I should come to exactly the opposite conclusion. In my opinion the sole object of that sub-section is to secure that after the publication of the advertisement no increase in value is to be taken into account. That provision would have been quite unnecessary if the date of the advertisement is to be taken for this purpose. It certainly seems an odd way of fixing the date of the valuation to say that after the date of the advertisement no additions or improvements are to be taken into account, without making provision for depreciation.

In my view the date of the advertisement is not the proper date to be taken. The proper date on Mathew J.'s view would appear to be either the date of the arbitration or the date of the notice to treat. In the present case it is sufficient to say that at any rate the proper date is not in 1910, when the advertisement was published, and that it must be some date on or after March 13, 1912, and inasmuch as the arbitrator has found that the values were the same on and after that date the award must stand. [His Lordship then dealt with a point not material to this report.]

Solicitors for claimants: *Wilson & Son.*
Solicitor for London County Council: *E. Tanner.*

J. S. H.

[IN THE COURT OF APPEAL.]

C. A.
1916
March 15.

JOY *v.* PHILLIPS, MILLS & CO., LIMITED.

Employer and Workman—Death caused by Accident—Compensation—Claim by Dependant—Accident arising out of Employment—Kick from quiet Horse—Evidence as to Habit of deceased Workman of hitting and teasing Horses—Admissibility—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

The deceased workman, who was employed as a stable boy by the respondents, was found in their stable in a dying condition, suffering from a kick behind the ear from one of their horses. There was no direct evidence as to how the accident happened. There was evidence that when the boy was found he was clutching in his hand a halter; that at the time when the accident happened the boy had nothing to do with the halter and had nothing to do in the stable; and that the horse was a quiet horse. There was also evidence that the foreman of the respondents' yard had some time previously had occasion to speak to the boy about hitting the horses with a halter and teasing them. The county court judge held that the boy must have done something to the horse, which was a quiet one, to make it kick out, and that at the time of the accident the boy's duties in the stable were over, and accordingly that the accident did not arise out of his employment:—

Held, that there was sufficient evidence upon which the county court judge might come to the conclusions he did.

Held, also, that evidence as to the previous habits of the boy with regard to hitting and teasing the horses was admissible.

Per Phillimore L.J.: Wherever an inquiry has to be made into the cause of death of a person, and, there being no direct evidence, recourse must be had to circumstantial evidence, any evidence as to the habits and ordinary doings of the deceased which may contribute to the circumstances by throwing light upon the probable cause of death is admissible, even in the case of a prosecution for murder.

Appeal from an award of the judge of the Wandsworth County Court sitting as an arbitrator under the Workmen's Compensation Act, 1906.

The proceedings in the present case were taken by the father of the deceased workman, claiming compensation for himself and other dependants.

The deceased workman was employed as a stable boy by the respondents. On May 26, 1915, at about 5.45 P.M. he was found

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in the respondents' stables in a dying condition, bleeding from a wound on the back of his head just behind his left ear occasioned by a kick from one of the respondents' horses. There was no direct evidence as to how the accident happened. A plan of the stables which was produced at the hearing before the county court judge showed a passage and at the end of it a gangway running right and left with a considerable number of stalls on either side of it. The stall behind which the boy was found was the first on the right-hand side on entering and was occupied at the time of the accident by a horse which the evidence showed had no vice, but was a quiet animal about five years old. The boy when found was lying on his back with his feet nearer to the horse than his head and clutching in his hand a halter.

A. C. Blockham, yard foreman in the service of the respondents, in the course of his evidence-in-chief said that the boy was employed as a stable boy "to sweep up the stables and yard and put the head collars up when the horses were out. The head collars are thrown on the ground when the horses go out. After he has picked them up he runs errands for printers, &c. He has dinner at 2.30; then he goes to the manger and picks up all the tools—curry-combs, &c.—and puts them in their places. Then the boy has nothing to do till a quarter to 4. Then he starts feeding; he takes baskets of grub. I put them into the mangers, then we water the horses, untie head collars, lead the horses to water, and bring them back again. The boy helps me. On the day of the accident I took the boy at twenty to 5 to give him some stuff to take to the carman. I came back at 6. The accident had happened. I saw the halter lying near him. The stable had been swept out and the broom put back in place. The boy had nothing to do with the halter at that time. He had nothing to do in the stable after the sweeping up. I had had occasion to speak to the boy about hitting the horses with a halter—teasing them." In cross-examination the witness said that "the boy was not wrong in being in the stable."

Edward Roche, a harness maker in the respondents' employ, in the course of his evidence said that he saw the deceased in the stable on the Friday before the accident. He had a long broom handle and was worrying a horse with it. The boy was in a position

of danger, and the witness ordered him out of the stable and kept him in the harness room and spoke to the man in charge.

The county court judge held that there was no evidence to show how the accident actually happened. There was no doubt that the boy was injured by the horse, but he did not think that he could reasonably say the accident arose out of the employment. The boy had certainly teased a horse on one occasion and he had also flicked at a horse with a halter. There was no reason why he should have had a halter in his hand. The boy must have done something to the horse, which was a quiet one, to make it kick out. His duties in the stable were over. The accident did not arise out of the employment, and the award must be in favour of the respondents.

The applicant appealed.

C. T. Williams, for the appellant. The county court judge was wrong in holding that the accident did not arise out of the employment. The boy was acting within the ambit of his authority, and were it not for the admission of inadmissible evidence the irresistible conclusion would be that he met his death in the course of his employment. The evidence as to teasing by the boy of horses on previous occasions ought not to have been admitted: *Hollingham* v. *Head* (1); *Holcombe* v. *Hewson* (2); *Reg.* v. *Geering* (3); *Hales* v. *Kerr.* (4) The effect of the admission of that evidence so coloured the county court judge's mind that there ought to be a new trial: *Smith* v. *Hardman & Holden.* (5)

[PHILLIMORE L.J. referred to Stephen's Digest of the Law of Evidence, 6th ed., art. 9, and *Rex* v. *Donellan.* (6)]

Assuming, however, that the evidence was properly admitted, it is submitted that the county court judge acted on mere conjecture in holding that the boy was teasing the horse when the accident happened. There is nothing to justify a judge in doing that which is a mere balancing of probabilities: *Pugh* v. *Earl Dudley* (7); *Perry* v. *Ocean Coal Co.* (8) There is no presumption against the workman, but on the contrary the presumption is that he did

(1) (1858) 4 C. B. (N.S.) 388.
(2) (1810) 2 Camp. 391.
(3) (1849) 18 L. J. (M.C.) 215.
(4) [1908] 2 K. B. 601.
(5) (1913) 6 B. W. C. C. 719.
(6) (1781) Unreported. Cited in Wills on Circumstantial Evidence, 6th ed., p. 380.
(7) (1914) 7 B. W. C. C. 528.
(8) (1912) 5 B. W. C. C. 421.

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what led to the accident in continuing his employer's work: *Astley* v. *R. Evans & Co.* (1)

Ellis Hill, for the respondents. The question for the decision of the county court judge was really one of fact, and there was evidence before him from which he could come to the conclusion he did. He has found that at the time the accident happened (1.) the boy's duties in the stable had ceased and (2.) he was teasing the horse. The first finding alone would be sufficient to dispose of the case on the ground that the accident did not arise out of the employment. As regards the second finding, evidence as to the mischievous habits of the boy on previous occasions was clearly admissible: *Makin* v. *Attorney-General for New South Wales.* (2) This evidence was as relevant to the issue as the evidence to show that the horse was a quiet horse.

[PHILLIMORE L.J. referred to *McLaren* v. *Caledonian Ry. Co.* (3)]

C. T. Williams replied.

LORD COZENS-HARDY M.R. This is a curious and in some respects an interesting case from the legal point of view. The question arises whether the learned county court judge was right in dismissing an application made by the dependant of a youth who was in the employ of the respondents. Part of his work was to assist the foreman in the stables, but his duties were strictly limited. He was not engaged in the stable all the day long, but he had definite duties imposed upon him. All we actually know about the death is this: One day at a little before 6 P.M. he was found, not actually dead, but very nearly on the point of death, in the stable with a wound due to a kick on the right-hand side of his head, just behind his ear. It appears from the plan of the stable that there is an entrance passage, and then at the end of it a central gangway going right and left with a considerable number of stalls on either side. The stall in question against which the body was found was the first one on the right-hand side as you go in. There is evidence that the horse that occupied that stall was not a vicious but a quiet horse. There is evidence too—and indeed this is the only thing we positively know about the accident—that with the boy's body was found a halter.

(1) [1911] 1 K. B. 1036, 1044. (2) [1894] A. C. 57.
(3) (1911) 5 B. W. C. C. 492.

The first thing to be considered is, What was his duty? What business had he in the stable at that time and what business had he there with a halter, even if he was entitled to go there without a halter? The evidence of the foreman seems to me to establish with reasonable clearness that his duties were marked out from hour to hour. [His Lordship referred to Blockham's evidence above set out, and continued:] I do not find any denial suggested in the cross-examination of the statement "The boy had nothing to do with the halter at that time. He had nothing to do in the stable after sweeping up." Reading the evidence most favourably to Mr. Williams' argument, "the boy was not wrong in being in the stable"; but what business had he there with this halter? It is clear that at the time of the accident he was going into the stable with the halter and not coming out with it. If he had been coming out after picking up the halter the wound would have been on the left and not the right-hand side. I think, therefore, that there was evidence, upon which the learned county court judge could reasonably act, to show, that at the time when this accident happened the boy had no business in the stable at all with the halter, and that, therefore, the accident did not arise out of his employment.

Then there is another point upon which we have heard a great deal of argument. The horse being according to the undisputed evidence not a vicious but a quiet horse, what is the reasonable explanation of the horse's sudden misbehaviour and its kicking out? It is suggested that it is reasonable for that purpose to inquire what were the habits of the boy. If you are entitled to inquire into the habits of the horse in order to consider whether the horse was vicious and likely to kick out, are you not entitled to inquire what were the habits of the boy? Was he a boy who was in the habit of playing with or teasing the horses and thus likely to bring upon himself this unexpected accident? The foreman said that he had had occasion to speak to the boy for hitting the horses with a halter and teasing them. In the long argument by Mr. Williams he argued that that evidence is inadmissible and ought to be struck out altogether, and that it so influenced the learned county court judge's mind that at the least a new trial should be granted. I am unable to assent to that. It seems to me that in a case like this the habits of the deceased cannot be disregarded.

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Lord Cozens-Hardy M.R.

It is utterly impossible to do so. If the question was whether a man was drowned in a stream in one circumstance or another, could you not ask whether the man was in the habit of going to his work by the side of the stream and then crossing over a bridge? It seems to me that you could. Otherwise you would be shutting your eyes altogether to facts necessary for drawing the proper inferences. So it is here. I cannot disregard the fact that this lad had on more than one occasion been remonstrated with for teasing the horses. On one occasion he was remonstrated with by the foreman for teasing the horses with a halter, and when his body was found a halter was found clutched in his hand, and that was close to the rear of a very quiet horse.

In my opinion we cannot say that the judge was not entitled to find as he did on a question of fact which was for him, and I think we cannot interfere with his finding.

PHILLIMORE L.J. I am of the same opinion. It has been argued at some length before us that the learned county court judge admitted inadmissible evidence, that he was guided by that, and that therefore his judgment must be set aside. In my judgment the evidence which was put before him was entirely admissible.

Wherever an inquiry has to be made into the cause of the death of a person, and, there being no direct evidence, recourse must be had to circumstantial evidence, any evidence as to the habits and ordinary doings of the deceased which may contribute to the circumstances by throwing light upon the probable cause of death is admissible, even in the case of a prosecution for murder. Especially in these cases under the Workmen's Compensation Act the books are full of cases where evidence as to the habits or practice of the deceased or even of his class has been admitted both in favour of the applicant and against him or her, both to contribute towards the conclusion that the accident to the deceased arose out of and in the course of the employment, and to contribute towards the opposite result. I have no doubt that if one had time to look for them one would find numerous actions under Lord Campbell's Act where evidence was given without objection as to the practices and habits of dead men if they were of any importance in regard to the case. In my opinion that objection is unfounded.

Putting that objection out of the way, I do not think there is anything in this case. The applicant, who was a dependant of the poor dead boy, had to prove his case. The learned county court judge thought he had not proved it. Upon the evidence before him he was perfectly entitled to say so. I think this appeal should be dismissed.

SARGANT J. I am of the same opinion. In a case of this sort where an accident has happened, when no one but the deceased was present, the Court necessarily has to deal with an estimate of probabilities; but an estimate of probabilities is not necessarily the same as mere conjecture. Here in estimating the probabilities it seems to me as relevant to admit evidence that the boy was mischievous as to admit evidence that the horse was quiet. Further, although the learned county court judge has come to a conclusion as to the probable cause of the death, namely, the teasing of the horse by the boy, still his judgment does not rest on that alone. He has also come to the negative conclusion that the dependant of the boy has not discharged the onus cast upon him. It seems to me impossible to say that the learned county court judge had not sufficient facts before him on which he might come to both of those conclusions, or, at any rate (which is sufficient for the present purpose), to the latter conclusion.

Appeal dismissed.

Solicitors: *Berry, Tompkins & Co.; Watson, Sons & Room.*

W. I. C.

C. A.

1916

March 20.

[IN THE COURT OF APPEAL.]

ROBINSON *v.* CONSETT IRON COMPANY, LIMITED.

Employer and Workman—Accident—Death—Dependant—Compensation —Maximum—Deduction of Weekly Payments already made—"Such sum"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 1 (*a*) (i.).

A workman met with an accident, as a result of which he died, and his widow applied for compensation. His earnings for the three years next preceding the accident amounted to 365*l.* 6*s.*, and before his death he had received weekly payments of compensation amounting to 63*l.* 13*s.* 8*d.* The applicant was wholly dependent on his earnings. She claimed to be entitled under Sched. I., par. 1 (*a*) (i.), of the Act of 1906 to 300*l.* on the ground that the 63*l.* 13*s.* 8*d.* compensation ought to be deducted from the total amount of his wages, 365*l.* 6*s.*, received during the last preceding three years, and not from 300*l.*, the maximum allowed by par. 1 (*a*) (i.), the result being that she would receive 300*l.* instead of 236*l.* 6*s.* 4*d.* as claimed by the employers :—

Held, that the words "such sum" in par. 1 (*a*) (i.) from which the compensation already received was to be deducted meant the maximum sum which was payable by the employers, namely, the 300*l.*, and that the widow was entitled to recover 236*l.* 6*s.* 4*d.*

Appeal from a decision of the judge of the Consett County Court.

This was a special case raising a question of law arising in the above arbitration stated under par. 4 of the Second Schedule to the Workmen's Compensation Act, 1906, by the committee representative of the Durham Colliery Owners' Mutual Protection Association and Durham Miners' Association as follows.

"1. The applicant is the widow of Alfred Robinson, who was employed by the respondents as a coal hewer at Chopwell Colliery in the county of Durham, and whilst so employed was injured on May 4, 1914, by an accident arising out of and in the course of his employment, and on August 18, 1915, he died as the result of the said accident.

"2. The earnings of the said Alfred Robinson in the employment of the respondents during the three years next preceding his said

injury were 365*l.* 6*s.*, and between the date of the said injury and the date of his death the said Alfred Robinson received in weekly payments of compensation under the said Act the sum of 63*l.* 13*s.* 8d.

"3. The applicant was wholly dependent upon the earnings of the said Alfred Robinson.

"4. It was contended before us on behalf of the applicant that she was entitled, under clause 1 (*a*) (i.) of the First Schedule to the said Act, to a sum of 300*l.* as compensation in respect of the death of the said Alfred Robinson, upon the ground that she was entitled to a sum equal to his earnings in the employment of the respondents during the three years next preceding the injury after deducting therefrom the amount of weekly payments made to him under the said Act (which would have left a sum of 301*l.* 12*s.* 4*d.*), but subject to the provision in the same clause contained that the sum payable should not, in any case, exceed 300*l.*

"5. It was contended before us on behalf of the respondents that the applicant was entitled to the sum of 236*l.* 6*s.* 4*d.* on the ground that the amount of weekly payments made to the said Alfred Robinson should be deducted not from his earnings in their employment during the three years next preceding the injury but from the sum of 300*l.* fixed by the Act as the maximum sum payable to dependants.

"6. The Court is respectfully requested to remit the case to the committee with such directions with respect to the amount or measure of compensation payable by the respondents as to the Court may seem meet."

The learned county court judge gave his decision as follows :

In my opinion the contention on behalf of the respondents set out in paragraph 5 of the case is correct—the amount of compensation payable by the respondents to the applicant is the difference between 300*l.* and the amount of the weekly payments made by the respondents to Alfred Robinson between the date of the accident and the date of his death.

The applicant appealed.

E. Shortt, *K.C.*, and *Lowenthal*, for the appellant. The dependants of a workman have a separate and independent right to compensation of which the workman cannot deprive them ; *Williams* v.

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ROBINSON v. CONSETT IRON COMPANY, LIMITED.

Vauxhall Colliery Co. (1) That right is provided for by Sched. I., par. 1 (*a*) (i.), and in the case of persons entirely dependent on the workman's earnings is limited in certain ways: *Whittaker* v. *James Joicey & Co.* (2) If the employers have already paid anything in respect of wages the amount of those payments must be deducted from "such sum." The words "such sum" refer to the earnings of the last preceding three years, and accordingly the compensation already paid should be deducted from the 365*l.* 6*s.*; the maximum of 300*l.* only applies after all calculations have been made, and the clause provides that no more than that shall be paid.

Rigby Swift, K.C., and *Meynell*, for the respondents, were not called upon.

LORD COZENS-HARDY M.R. This is a curious point arising under the First Schedule, par. 1 (*a*) (i.), of the Workmen's Compensation Act, 1906, and the question is the position of dependants of a workman whose death occurred by reason of an accident arising out of and in the course of the employment when a certain sum has been paid by the employer to the workman after the accident but before his death. The section contemplates this: The dependants undoubtedly have an independent right, as I said in *Williams* v. *Vauxhall Colliery Co.* (3), "a separate and independent right in the event of the workman's death in such circumstances—a right which the workman cannot deprive them of except in this sense, that the Act contemplates that the employer is not from first to last bound to pay more than the maximum compensation given by the Act." In the present case the earnings of the deceased man for three years amounted to more than 300*l.*—365*l.* Weekly payments were made by the employer to the workman after the accident amounting to 63*l.* odd, and the question is whether that 63*l.* is to be deducted from the 365*l.*, or whether it is to be deducted from the 300*l.* which is the maximum compensation contemplated by the clause.

Now the language of Sched. I. does not seem to me to leave much doubt or room for much argument. It says, par. 1 (*a*), "where death results from the injury—(i.) if the workman leaves any depen-

(1) [1907] 2 K. B. 433. (2) (1915) W. C. & Ins. 541.
(3) [1907] 2 K. B. 436.

dants wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds"—that is to say, maximum 300*l.*, minimum 150*l.* Then there is a proviso which was inserted for a purpose which was explained in *Williams* v. *Vauxhall Colliery Co.* (1), that the employer "is not from first to last bound to pay more than the maximum compensation given by the Act." The proviso says "provided that the amount of any weekly payments made under this Act, and any lump sum paid in redemption thereof, shall be deducted from such sum." Such sum is to be the maximum to which he is entitled under the Act, the 300*l.*, and we have nothing to do for this purpose with the 365*l.* 6*s.* The learned judge puts the point very clearly in his short judgment which I am quite prepared to adopt: "In my opinion the contention on behalf of the respondents set out in paragraph 5 of the case is correct—the amount of compensation payable by the respondents to the applicant is the difference between 300*l.* and the amount of the weekly payments paid by the respondents to Alfred Robinson," the applicant's husband, "between the date of the accident and the date of his death." Any other view would be directly contrary to what this Court said in *Williams* v. *Vauxhall Colliery Co.* (2), where the employers were held not bound from first to last to pay more than 300*l.*

PHILLIMORE L.J. I agree. I think that is the principle laid down by the Master of the Rolls in *Williams* v. *Vauxhall Colliery Co.* (2) The employer is not to pay to the man while he is alive, or his dependants afterwards, more than 300*l.* altogether. That is the limit of his liability; and when one comes to consider that it was always intended that the employer should insure himself it is very desirable that an insurance company should know its maximum liability. As a matter of grammar, I think that is with the respondents. We have to discover what such sum is from which weekly payments are to be deducted. Such sum is described as a sum which has certain qualifications, and one qualification is "not exceeding 300*l.*" If you look at the grammar it is a sum which is equal

(1) [1907] 2 K. B. 436. (2) [1907] 2 K. B. 433.

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Phillimore L.J.

to so and so, but not exceeding 300*l.* One of the adjectival clauses qualifying the sum is "not exceeding 300*l.*" It might be expressed in this way giving the same meaning, and then there would be no doubt "a sum in no case exceeding 300*l.* equal to his earnings," &c., "or equal to the sum of 150*l.*" The truth is that if there is any difficulty in the matter at all it is by introducing the word "sum" in front of "150*l.*" It might have been perhaps better to have said "or 150*l.*"; but one of the qualifications of the word "sum" is that it is a sum which is not to exceed 300*l.*

SARGANT J. I agree.

Solicitors: *Hyman Isaacs, Lewis & Mills, for Isaacs & Heath, Sunderland; Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-upon-Tyne.*

H. C. R.

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March 29.

KAUFMANN BROTHERS *v.* LIVERPOOL CORPORATION.

Public Authorities Protection—Limitation of Action—Claim for Compensation for Damage by Riot—Riot (Damages) Act, 1886 (49 & 50 *Vict. c.* 38), *ss.* 2, 3, 4—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

An action against a police authority to recover compensation under the Riot (Damages) Act, 1886, is not an action "in respect of any alleged neglect or default in the execution of any Act, duty, or authority," within s. 1 of the Public Authorities Protection Act, 1893, and the limitation of time for bringing an action thereby imposed does not apply.

APPEAL from the Liverpool County Court.

The plaintiffs brought this action in the county court to recover from the defendants, as the police authority, compensation under the Riot (Damages) Act, 1886 (1), for damage done to their premises

(1) 49 & 50 Vict. c. 38, s. 2: "(1.) Where a house, shop, or building in any police district has been injured or destroyed, or the property therein has been injured, stolen, or destroyed, by any persons riotously and tumultuously assembled together, such compensation as hereinafter mentioned shall be paid out of the police rate of such district to any person who has sustained loss by such injury, stealing, or destruction . . . ."

Sect. 3: "(1.) Claims for com-

and goods therein during a riot on May 10, 1915. They sent their claim for compensation to the defendants in May, and, being dissatisfied with the amount offered them as compensation, commenced this action on December 11. The defendants pleaded the Public Authorities Protection Act, 1893, s. 1 (1), alleging that the action was barred because it was not commenced "within six months of the act, neglect, or default complained of," that is, the date of the riot. The county court judge held that s. 1 of the Act of 1893 did not apply and gave judgment for the plaintiffs for 40*l*.

The defendants appealed.

Leslie Scott, K.C., and *A. H. Maxwell*, for the appellants. This is an action against a public authority in respect of a neglect or default in the execution of a statute, duty, or authority, within s. 1 of the Public Authorities Protection Act, 1893. The plaintiffs' cause of action is the right to receive compensation which accrues

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pensation under this Act shall be made to the police authority of the district in which the injury, stealing, or destruction took place, and such police authority shall inquire into the truth thereof, and shall, if satisfied, fix such compensation as appears to them just."

Sect. 4: "(1.) Where a claim to compensation has been made in accordance with the regulations, and the claimant is aggrieved by the refusal or failure of the police authority to fix compensation upon such claim, or by the amount of compensation fixed, he may bring an action against the police authority to recover compensation in respect of all or any of the matters mentioned in such claim and to an amount not exceeding that mentioned therein, ...

"(2.) If the amount of compensation for which such action is brought does not exceed 100*l*., the action shall be brought in the county court for any district in which any part of the police district is situate."

(1) 56 & 57 Vict. c. 61, s. 1: "(1.) Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:

"(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof."

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when the damage is done by rioters; and the duty of the police authority is to pay compensation under the Riot (Damages) Act, 1886. If the police authority either refuses to pay or offers an insufficient amount, there is a neglect or default on their part in the execution of an Act, duty, or authority. Under the earlier Act of 1827 (7 & 8 Geo. 4, c. 31, s. 3) an action for compensation for damage done by rioters had to be commenced within three months "after the commission of the offence"; and the position must still be the same under the Act of 1886, time running from the commission of the offence, that is, from the time when the damage was done by rioters. Cases under the Fatal Accidents Act, 1846, are analogous, and they show that time runs from the act of negligence though the plaintiff can only sue for the resultant loss: *Williams* v. *Mersey Docks and Harbour Board.* (1) [They referred to *Hewlett* v. *London County Council.* (2)]

G. C. Rees, for the respondents, was not called upon to argue.

LUSH J. This case seems to me to be really quite plain. The plaintiffs were the occupiers of premises in Liverpool which were damaged in a riot which occurred in May last, and they brought this action against the Liverpool Corporation to recover compensation under the Riot (Damages) Act, 1886. That Act repealed the earlier Act of 1827 and enacted a new set of provisions enabling persons in the position of the plaintiffs to claim, and take proceedings to recover, compensation. Sect. 3 imposes a duty upon the police authority to fix the compensation. Sect. 4 provides that the claimant may sue the authority if they do not fix compensation, or if he is dissatisfied with the amount. In this case the police authority failed to fix the compensation to the satisfaction of the plaintiffs and they brought this action. It was an action to recover compensation under the statute; it was not brought to recover damages for any default on the part of the police authority; it was simply an action to recover such an amount as the county court judge might think right to allow as compensation for the damage done to the plaintiffs' property.

That being so, the defendants pleaded the Public Authorities Protection Act, 1893, and contended that the plaintiffs were out

(1) [1905] 1 K. B. 804. (2) (1908) 24 Times L. R. 331.

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Lush J.

of time because they had not commenced their action within six months. Sect. 1 of that Act provides: [The learned judge read the section.] The answer in this case to that plea is that the action was not brought for any "act, neglect, or default" on the part of the defendants. In my opinion the county court judge took the right view and rightly held that the Act did not defeat this claim. The appeal must be dismissed.

ROWLATT J. agreed.

Appeal dismissed.

Solicitors for appellants: *F. Venn & Co., for Pickmere, Liverpool.*

Solicitors for respondents: *Hyman Isaacs & Lewis, for H. J. Davis & Co., Liverpool.*

J. H. W.

[IN THE COURT OF APPEAL.]

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March 17.

ANDREWS *v.* WIRRAL RURAL DISTRICT COUNCIL.

[LIVERPOOL DISTRICT REGISTRY.]

[1915 A. 382.]

Public Health—New Building—Temporary Building—Contravention of By-laws—Right of Authority to seize and destroy—Notice—Proof—Secondary Evidence—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 157—*Public Health Acts Amendment Act*, 1907 (7 *Edw.* 7, *c.* 53), *s.* 27, *sub-s.* 4.

The general principle that no notice to produce a notice is usually required does not apply to a case in which the notice required to be produced has been served on a third person.

Robinson v. *Brown* (1846) 16 L. J. (C.P.) 46 followed and applied; *Philipson* v. *Chase* (1809) 2 Camp. 110 explained; *Kine* v. *Beaumont* (1822) 3 Brod. & B. 288 distinguished.

A structure may be a new building under the Public Health Act, 1875, and at the same time a temporary building under the Public Health Acts Amendment Act, 1907.

A local authority had power, under by-laws made under the Public Health Act, 1875, if any work should be "begun or done" in contravention of the by-laws, to pull down the work after notice to the person by whom the work had been begun or done. A building was constructed in contravention of the by-laws by W. R. A., and, after being set upon wheels, was sold to the plaintiff. The

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local authority gave notice to the plaintiff to show cause why it should not be pulled down, and, his reply being unsatisfactory, pulled it down. The plaintiff sued for damages. At the trial the local authority sought to prove notice to W. R. A. by secondary evidence, namely, a duplicate notice, only :—

Held, affirming Atkin J., that the duplicate notice was inadmissible, and the local authority, not having proved notice, could not justify under the Public Health Act, 1875; but, reversing Atkin J., that the local authority, having complied with the provisions of the Public Health Acts Amendment Act, 1907, could justify under that Act.

APPEAL from Atkin J.

A bungalow was constructed in 1914 by W. R. Andrews and used for a summer residence, being set up in a field at Moreton, Cheshire, in the defendant council's district. It was 21 feet long, 9 feet wide, with a roof sloping from 9 feet at the highest part to 7 feet at the sides, made of wood, having two rooms, one of which had a fireplace, and windows, and rested upon baulks of timber on the ground. The defendants took proceedings against W. R. Andrews for having erected the structure in contravention of their by-laws (1) made under s. 157 of the Public Health Act, 1875. He was convicted, and sold the structure to a Mr. Scholefield for 20*l.* The defendants gave notice to Scholefield to show cause why the building should not be destroyed. Scholefield, having received the notice, put the structure upon wheels (which, however, were

(1) By-law 101 : "If any work to which any of the foregoing bye-laws may apply be begun or done in contravention of any such bye-law, the person by whom such work shall be so begun or done, by a notice in writing, which shall be signed by the clerk to the council, and shall be duly served upon or delivered to such person, shall be required on or before such day as shall be specified in such notice by a statement in writing under his hand or under the hand of an agent duly authorised in that behalf, and addressed to and duly served upon the council, to show sufficient cause why such work shall not be removed, altered, or pulled down ; or shall be required on such day and at such time and place as shall be specified in such notice to attend personally or by an agent duly authorised in that behalf before the council and show sufficient cause why such work shall not be removed, altered, or pulled down. If such person shall fail to show sufficient cause why such work shall not be removed, altered, or pulled down, the council shall be empowered, subject to any statutory provision in that behalf, to remove, alter, or pull down such work."

ineffective to remove it out of the field) and sold it to the plaintiff for 30*l*. The defendants gave the plaintiff notice to show cause why it should not be removed or destroyed, and, receiving no satisfactory answer of his intentions, seized and took it to pieces. The plaintiff brought this action for damages for wrongful seizure and destruction. At the trial Atkin J. held that the structure was a new building within the Public Health Act, 1875, which had been erected in contravention of the defendants' by-laws, and which they would have been entitled to pull down if they had complied with the provisions of their by-law 101 requiring notice to W. R. Andrews as the person who had "begun or done" the "work"; but that they had failed to prove notice, because they sought to establish it by secondary evidence, namely, by production of a "counterpart original" or duplicate notice contained in a letter admitted to have been posted, without first putting themselves in a position to give secondary evidence by showing that the original had been lost or destroyed or summoning W. R. Andrews on a subpœna duces tecum. He held, further, that the defendants could not justify the seizure under s. 27, sub-s. 4, of the Public Health Acts Amendment Act, 1907, because the structure being a "new building" within the Public Health Act, 1875, could not, as a matter of law, be at the same time a "temporary building" within the Act of 1907. He therefore gave judgment for the plaintiff. The defendants appealed.

Rigby Swift, *K.C.*, and *Greaves Lord*, for the appellants. Atkin J. was wrong in law in holding that because this structure was a new building under the Public Health Act, 1875, it could not be a temporary building under the Public Health Acts Amendment Act, 1907. Sect. 27 of the Act of 1907 contemplates that a temporary building may be a building under the Act of 1875 and the by-laws made thereunder, and that some temporary buildings under the Act of 1875 may be exempt from the operation of the Act of 1907. Whatever the structure was before wheels were put on, it was a temporary building from that time: *Richardson* v. *Brown* (1); *Newell* v. *Ormskirk Urban Council* (2), following which the Act of 1907 was passed. Sect. 27 does not in terms require

(1) (1885) 49 J. P. 661. (2) (1907) 71 J. P. 119.

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notice to be given to any one, but the common law recognizes that notice must be given to a person so that he may show cause against his property being destroyed. The defendants have satisfied all necessary conditions if this structure was a temporary building.

Atkin J. was also wrong in holding that the appellants did not give proper notice under the Act of 1875. They tendered evidence which was refused, but, if admitted, would have proved it: *Jory* v. *Orchard* (1); *Philipson* v. *Chase.* (2) Sect. 267 of the Act of 1875 must mean that the contents of a notice properly served may be proved without producing the notice. Here two identical documents, one served and one retained, were of equal value, and the contents of the one served can be proved by the one retained.

Greer, K.C., and *MacConkey*, for the respondent. The structure was a new building under the Act of 1875 and the appellants have failed to prove their right to exercise their powers of destruction. They have no powers outside their by-laws under that Act. The only by-law applicable is 101; and it has not been complied with. The contents of a document cannot be proved by secondary evidence till the means of proof by primary evidence are exhausted. Sect. 267 deals with service and has nothing to do with the question how the contents of the documents served are to be proved. It is a fallacy to talk of two documents as both originals. The general principle that no notice to produce a notice is usually required does not apply where, as here, the notice to be produced has been served on a third person: Taylor on Evidence, 10th ed., s. 451; *Robinson* v. *Brown* (3); *Lanauze* v. *Palmer* (4); *Williams* v. *Munnings* (5); *Sharpe* v. *Lamb* (6); *Jones* v. *Tarleton.* (7) It may be doubted whether this was a notice "required to be served under this Act" within s. 267.

Moreover, by-law 101 is unreasonable, bad, and void in law, and, the appellants having no power outside it to demolish the building, their action was wholly illegal.

The structure being a new building under the Act of 1875 cannot be a temporary building under the Act of 1907. The latter Act

(1) (1799) 2 Bos. & P. 39.
(2) 2 Camp. 110.
(3) 16 L. J. (C.P.) 46.
(4) (1827) Moo. & M. 31.
(5) (1824) Ry. & M. 18.
(6) (1840) 11 Ad. & E. 805.
(7) (1842) 9 M. & W. 675.

was passed to cover all cases not covered by the earlier Act, and there cannot be a building to which both Acts apply at the same time: *Fielding* v. *Rhyl Improvement Commissioners.* (1) A structure may cease to be a building under the Act of 1875 and become a temporary building within the Act of 1907. If the Act of 1875 were out of the way it might be difficult to say this structure was not a temporary building within the Act of 1907.

Penal provisions must be strictly complied with.

LORD READING C.J. This is an appeal by the defendants from a judgment of Atkin J. on the trial of the action, taken first with a jury and then by agreement left for his decision. It was brought by Mr. Arthur Andrews for damages against the defendants for having wilfully seized and destroyed a van, his property. The defence was: "This is a new building within the meaning of the Public Health Act, 1875, and therefore there was power under that Act in the circumstances to pull down and destroy it." It is agreed by Mr. Greer that this van is properly called a building; whether within the Act of 1875 or the Act of 1907 is another matter. This van was a structure 21 feet long, 9 feet wide, and at its highest place about 9 feet high, with a sloping roof, described as a bungalow. It formed one of a number of such habitations which had been erected or set up in a field at Moreton in Cheshire. It was originally erected by a Mr. W. R. Andrews for a summer residence. It was divided into two rooms, one with a fireplace in it, and was built of panels, and rested upon, without being fixed to, the ground, upon planks. Having been in the ownership of Mr. W. R. Andrews for some time, it was sold to a Mr. Scholefield for 20*l.* Mr. Scholefield got into difficulties with the local authority in respect to it, and some time before January 14, 1915, it was lifted up by a jack and put upon wheels. It thus, instead of resting upon the ground, rested upon wheels, and a matter in controversy here was whether it was something in the nature of a conveyance which could be rolled on the wheels out of the field. Mr. Rigby Swift suggested that the only point of putting it upon wheels was to enable the owner to wheel it out of the by-laws under the statute—there never was any intention of wheeling it out of the field, as Atkin J. found.

(1) (1878) 3 C. P. D. 272.

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Lord Reading C.J.

It could not be done with the structure erected as it was on odd wheels brought together simply for the purpose of raising it from the ground. On January 14, 1915, a notice was served by the defendant council upon the plaintiff, who had purchased this structure on wheels from Mr. Scholefield for 30*l.*, to appear on January 18, in accordance with the statute of 1875, to show cause why the building should not be removed or destroyed. The result of his appearance before the council was unsatisfactory. He seems to have given no answer as to what he intended to do. In any event the council thereupon decided to take the bungalow to pieces; and did so. The plaintiff says "The council has seized and destroyed my property and I claim damages for the trespass." The council says in answer that it was justified in the action which it took. The question is whether it was justified. It says that it was on two grounds—first it says that under the Act of 1875, if this building properly came within that Act, it had done all that was necessary to entitle it to destroy the building, that it had given the proper notices, and had complied with its own by-law, which it contends was a good by-law.

Under the Public Health Act of 1875, s. 157, power is given to local authorities to make by-laws with respect to (inter alia) the sufficiency of space about buildings and drainage of buildings and depositing of plans and sections by persons intending to construct buildings. In pursuance of that the defendant council made by-law 101, giving power to remove a building. The plaintiff says that the "work" was "begun or done" by Mr. W. R. Andrews, who originally made the structure and set it up in the field, and that no notice was served upon him. The defendants sought to prove that notice had been served by evidence that a letter had been sent by registered post on November 11, 1914, addressed to Mr. W. R. Andrews, which they contended contained the notice in accordance with the provisions of the by-law. Objection was then taken that the contents of the letter could not be proved. At first there was an objection that the postage was not properly proved. Thereupon Mr. Rigby Swift, for the defendants, was ready to call a witness to prove it, and Mr. Greer, for the plaintiff, then accepted the statement that there had been a proper postage on November 11 of a letter addressed to Mr. W. R. Andrews. Mr. Rigby Swift then

sought to prove the contents, but the objection to that was that he could not prove the contents by giving secondary evidence of it, namely, by producing a copy, however well authenticated, until he had laid a foundation for the secondary evidence by proving that he had served Mr. W. R. Andrews with a subpœna to produce the document. Neither a subpœna had been served upon Mr. W. R. Andrews nor a notice to produce upon the plaintiff, but Mr. Rigby Swift contended that he was entitled to prove the notice by the production of what was called a counterpart original, which means (now that we have seen the document) a document in the same terms signed by the clerk to the defendant council and kept by the council. Another document in similar terms, also signed by the clerk to the defendant council, was, it was said, forwarded in the envelope to Mr. W. R. Andrews on November 11. No doubt the retained document is a counterpart, which was excellent evidence of the document sent to Mr. W. R. Andrews; if it was admissible as secondary evidence, it was as good of its kind as could possibly be; but the question was whether secondary evidence could be admitted. Atkin J. came to the conclusion that he could not admit it, and on consideration, notwithstanding the natural objection to allowing a point of this kind to be determined by a technical objection, I think he was right. The objection is very technical, but one must bear in mind, as Mr. Greer rightly pointed out, that conditions are imposed upon the local authority before they can remove, seize, or destroy private property, and it is right to see that the council establishes properly that all the conditions have been complied with to entitle it to destroy this private property.

The difficulty here is that it was not proved before Atkin J. that all the notices necessary, in particular the notice to Mr. W. R. Andrews, had been served. It was contended, first, that under s. 267 of the Act of 1875 notice may be served by post, and, secondly, that it must be open to the council to prove the contents of the notice in order to establish that it is a notice that can be served by post. That seems to me to be wrong. The first thing to establish is that there was notice of a particular date sent to the individual in question; the mode of serving it is fulfilled if it is established that it was sent by post. The mode of service here was right, but that does not, in my judgment, entitle the council to give secondary evidence of

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the contents. Mr. Rigby Swift further argued that this was a notice of which secondary evidence could be given without going through the formality required by common law. There are undoubted exceptions to the common law rule that certain steps must be taken to obtain primary evidence before secondary evidence can be given. Here there was no proof that the document in question had been lost or destroyed; no such step had been taken as that of serving Mr. W. R. Andrews with a subpœna to produce it. I think the law is accurately stated in Taylor on Evidence, 10th ed., vol. 1, ss. 450, 451. The effect of the authorities is that there are certain exceptions to the rule—seven cases, it is stated, in which notice to produce is not necessary, and for other purposes I take it also it would not or might not be necessary to prove that the addressee of the document had been subpœnaed to produce it. The argument here is that, where the instrument is itself a notice, secondary evidence must be admitted. No doubt that was so originally with regard to notices to produce, obviously for the reason that, if it were not so, a notice to produce a notice to produce would have to be given, going on ad infinitum. That exception has been extended to other notices, more particularly to a notice to quit and to a notice of dishonour, provided that the action be brought upon the bill, but not otherwise. A case of an action on the bill came up for consideration in 1822, *Kine* v. *Beaumont* (1), where it was held that a copy of an original letter giving notice of dishonour of a bill was admissible in evidence without notice to produce the original letter. The learned judges there were in some doubt about the matter, and the case was adjourned for the purpose of consulting the other judges, and Dallas C.J. in giving the judgment on the adjourned hearing said: "As a matter of general practice, we wished to collect the opinion of other judges, and the result is, that the copy of an original letter, giving notice of the dishonour of the bill, is admissible, without notice to produce the original letter." That applies also to certain other documents such as notice in action, and also bills of costs of solicitors. But examination of the authorities shows that in all these cases the reason why the Court has dispensed with proof which would otherwise be necessary is that the document of which secondary evidence

(1) 3 Brod. & B. 288, 291.

is to be given is one which in effect is a document between the parties to the action. For example, when a defendant is sued upon a bill, and it is necessary to establish that there was a notice of dishonour, it is thought sufficient to allow secondary evidence to be given because, the defendant being sued upon the bill and knowing that notice of dishonour is one of the matters which must be proved, the judges by custom as an exception to the rule allowed secondary evidence to be given, and what we may properly term a practice, or a custom as it has been called in one of the cases, grew up, which the judges eventually recognized, and it was then made a principle of law to be grafted on the ordinary law of evidence. That happened a long time ago, and ever since has been followed. In this case, in my opinion, the defendants are unable to bring themselves within that principle.

There is one authority upon which Mr. Rigby Swift took his stand, *Philipson* v. *Chase* (1), where no doubt Lord Ellenborough used language which, according to the report, justified the argument that, provided the document produced is a counterpart original of the document sent, it may be taken as evidence of the document sent, without notice to produce or without going through any other formality otherwise necessary before secondary evidence can be admitted. I do not think Lord Ellenborough really meant to lay down that proposition. I think what he was dealing with was the case between parties to the action within the principle of *Kine* v. *Beaumont* (2) to which I have referred. *Kine* v. *Beaumont* (2) was decided some thirteen years after the decision of Lord Ellenborough, and when evidently the practice had already been in existence for some time without having been recognized by all the judges, as it was in *Kine* v. *Beaumont*. (2) But the exception rested, not upon the nature of the secondary evidence, but upon the principle that the document was one passing between the parties to the action, and that the one party must know that it was necessary for him to produce the document in question and that it was unnecessary for the other party to go through the formality of giving him notice to produce it. *Philipson* v. *Chase* (1) puts the matter rather upon the ground that the document produced to the Court was a counterpart original. If Lord Ellenborough is correctly

(1) 2 Camp. 110. (2) 3 Brod. & B. 288.

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reported, I find it impossible to accept that as the reason for the exception. There is really only one original, namely, the document that is sent to the party. It may be that a most excellent copy is kept, so good that it is a facsimile of the document itself, but it still remains not the document which was sent. Consequently I think the result must be that Lord Ellenborough has not stated all the reasons, and that taken by itself *Philipson* v. *Chase* (1) does not properly express the principle of law. In Taylor on Evidence there is a note dealing with this very case, which expresses some doubt as to the decision, and in section 451 the law is thus stated: "An exception to the general principle, that no notice to produce a notice is usually required, appears to exist in all cases in which the notice required to be produced has been served on a third person." That seems to be the present case. Here the notice in question was required to be served on Mr. W. R. Andrews, who is not a party to the action, and consequently this case is an exception to the general principle of law that notice to produce a notice is not usually required. That exception to the general principle was laid down as law in *Robinson* v. *Brown*. (2) There by a joint and several bond A. and B. had become sureties for the payment of a balance due from C. The defeasance provided that the bond should be void if A. and B. or either of them paid the balance within a certain time. In an action against the executors of A., upon a replication which denied notice to the executors of A. and B., it was held that a duplicate of the notice served on B. was not admissible, and that B. should have been subpœnaed to produce the original he received, or it should have been shown to have been lost or destroyed. That case seems to me exactly to fit the present case, and without reading the reasoning of Wilde C.J. or of Maule J. I am content to say that in my judgment that case is conclusive upon the point before us, and that consequently secondary evidence of the notice was, in the circumstances, not admissible, and that Atkin J. was right in that respect. Consequently the statute of 1875 and the appeal based on it would have no application and did not justify the defendants in the course taken.

But then it is said by the council, "We do not require to base our justification upon the statute of 1875 at all; there is another statute

(1) 2 Camp. 110. (2) 16 L. J. (C.P.) 46.

which was passed to amend that Act, namely, the Public Health Acts Amendment Act, 1907." They say that by s. 2 of the Act of 1907 that Act is to be construed as one with the Public Health Acts and consequently read with the Act of 1875. Sect. 27 of the Act of 1907 lays down certain conditions to be applied when a person erects or sets up a temporary building. These conditions are not nearly so rigid as those imposed upon persons setting up buildings which are not temporary. Power is given under s. 27, sub-s. 4, to the local authority to deal with buildings in certain events, and, if we are satisfied in this case that the building in question was a temporary building within the meaning of the statute in 1907, there is no doubt that all the conditions have been complied with by the defendants to entitle them to seize and destroy the building in question. The point to which we have to direct our attention is whether this is a temporary building. Atkin J. held that it was not a temporary building because he thought it came within the Act of 1875 and as a matter of law could not come under both the statutes, and if once it was brought within the Act of 1875 it could not be brought within the Act of 1907, and as the conditions of the Act of 1875 had not been complied with the defendants were wrong. I cannot agree with that view. It seems to me that the Act of 1907 was passed to apply to buildings of a temporary character and in that respect to alter the Act of 1875, but I see no reason to read the Act of 1907 as if it applied only to such buildings as could not before the passing of the Act of 1907 come within the Act of 1875. I cannot find any words in the Act of 1907 to drive me to that conclusion, and I think what we have to consider is whether this is a temporary building.

There is no doubt, having regard to the facts, that it was a temporary building. There is nothing to show that Atkin J. would have found to the contrary if he had thought it open to him, but, whether so or not, we have only to deal with the evidence. Bearing in mind that Mr. Scholefield was the owner or tenant of the field and let people put up these buildings for a payment of 3*l.* 10*s.* per season, and that they could either take them away or store them as they pleased, in truth what was happening was that they were licensed to use the field for the purpose of the buildings during the season. From many points of view, and having regard to the condition of this building

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at the time in question, namely, that it was standing upon four wheels, and to the character of the structure, I have no hesitation in coming to the conclusion that it was a temporary building. Once arrived at that conclusion, sub-s. 4 of s. 27 has been complied with in all respects, and it follows that the local authority was entitled to remove or pull down the building because the plaintiff had failed, when called upon, as he was properly called upon by the notice of January 14, to show cause to the contrary.

For these reasons I come to the conclusion that the judgment of Atkin J. was wrong and must be reversed in this respect, and judgment entered for the defendants.

WARRINGTON L.J. I am of the same opinion. The question is whether the defendants were justified in taking to pieces and removing a wooden structure described by the plaintiff as a van. It had prior to December, 1914, been a small building containing two rooms standing on baulks of timber laid on the ground in a field at Moreton. It was so erected under licence from the tenant or owner of the field in question, who took the sum of 3*l*. 10*s*. per season for the privilege. At the time in question, the middle of January, 1915, the thing which was removed was not that thing which had been standing during 1914 in the way I have mentioned. Some time prior to December 12, 1914, the machine had been lifted from the ground by a jack, wheels had been attached to it and it had been moved from the place where it had previously stood to another place. As to whether the building was a temporary building or not, I should have been prepared to determine that as it originally stood it was a temporary building; but it is unnecessary to do that, because I am satisfied that when it was set upon wheels and moved from one place to another it must be regarded as a temporary building and as a temporary building then "set up," to use the expression of the Act of 1907.

The defendants seek to justify their proceedings in two ways: first, they say "If this was a building subject to the by-laws which we have adopted under the Act of 1875, then by virtue of those by-laws we were entitled to remove it." But they are met by this: that they have not proved that they took the necessary steps under those by-laws to entitle them to remove the structure. As to that, it is

sufficient for me to say that I agree with the Lord Chief Justice and have nothing to add, not the less because on this part of the case we are not differing from Atkin J.

But the defendants also justify their proceedings on another ground: they say that the building which they took down was a temporary building under the Act of 1907, that under s. 27, sub-s. 4, of that Act it was a building set up without any application for permission, and therefore, of course, without their permission, and that they as the local authority were authorized by that section to cause the building to be pulled down or removed. There I think they are right. Atkin J. has held, as a matter of law, that if, as he thought was the case, the building was one which might have been subject to the Act of 1875 and to the by-laws made thereunder it could not be within the Act of 1907. There I fail to agree with him. It seems to me that a temporary building subject to the provisions of the Act of 1907 is not necessarily one that would not be a building subject to by-laws under the Act of 1875. It may well be that the Legislature thought fit to make special provision with regard to temporary buildings, which might be such as, if the special provisions were not made, would be subject to the by-laws and to the Act of 1875.

Upon that ground, therefore, I differ from Atkin J. and think his judgment ought to be reversed.

SCRUTTON J. The plaintiff was the owner of a bungalow on wheels which he called a chattel, that is a van, which Atkin J. has found to be a building. It was erected without any approval from the local authority of plans. Thereupon the local authority pulled it down. The plaintiff brought this action against them for damage to his chattel. The local authority justified their action on two grounds. They said "This is a building which has been begun in contravention of our by-laws, especially of the by-law which required plans, and we are entitled to pull it down under by-law 101." They said, secondly, that if they were not entitled to pull it down under by-law 101 they were entitled to pull it down under the Act of 1907. Atkin J. has found that they were not entitled to pull it down under by-law 101, because a condition of their acting under that by-law was that they should serve the person "by whom such

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work shall be begun or done" with a notice in writing, and they have not proved that notice, because they were only prepared to tender evidence of a copy of it. I think Atkin J. was right in that view. The rule that secondary evidence of notices is admissible has never (so far as I can find) been held to apply where the notice was served on a different person from a party to the action who is sought to be affected by it. *Robinson* v. *Brown* (1) is ample authority for the view taken by Atkin J. I therefore say nothing more on that point, except that I agree with the judgment of the Lord Chief Justice.

"Then," said the local authority, "at any rate we can justify under the Act of 1907 dealing with temporary buildings, under which we have given requisite notice." Atkin J. has dealt with that contention in this way: "It appears to me that, once it is decided in accordance with the original view of the district council that this was a new building within the Act of 1875, then it is not a temporary building within the Act of 1907. It appears to me to be impossible that the requirements should be twofold in respect of a building of this kind—(*a*) that it should have to comply with the requirements of the by-laws as to putting in foundations and so on, and (*b*) that it should be a temporary building as to which all that is required is the deposit of plans and sections and the approval of the local authority." He therefore held that being a building within the Act of 1875 it could not be a temporary building within the Act of 1907, and that therefore the council could have no power under the latter Act. I cannot take that view of the two Acts. The Act of 1875 applies to all buildings. The Act of 1907 applies to temporary buildings. If a person desiring to erect a building thinks his building is a temporary building he can submit his plans under the Act of 1907. The local authority may come to the conclusion that it is not a temporary building, in which case he would have to submit his plans under the Act of 1875. Mr. Greer relied on the difficulty there would be for a person to know which Act he was under and his possible liability for double penalties. It does not lie in the mouth of a man who never takes any trouble to submit plans at all to say "I have a difficulty in knowing which Act I am liable under." The plaintiff never took any trouble to find out, and the question of double penalties has been expressly dealt with by the two Acts. It was a

(1) 16 L. J. (C.P.) 46.

condition of things which it was known might exist, because, quite apart from the Act of 1907, many local authorities had local Acts, and acts might be an offence both under the Act of 1875 and under a local Act; and s. 340 of the Act of 1875 provides: "No person shall be punished for the same offence both under a local Act and this Act." The Act went on to contemplate that there might be other Acts besides local Acts which might apply. Sect. 341 provides: "No person who has been adjudged to pay any penalty in pursuance of this Act shall for the same offence be liable to a penalty under any other Act"; and when the Act of 1907 was passed a similar provision was inserted in s. 11: "No person shall be liable, except in the case of a daily penalty, to more than one penalty in respect of the same offence." I think, therefore, that Mr. Greer's fears as to what might happen to a person who did not take the trouble to find out which Act he was liable under have been removed by the provisions of the Acts. I see no difficulty whatever in a building which is a temporary building being under both Acts. An owner who has complied with and obtained the sanction of the local authority to construct his building under the provisions as to temporary buildings cannot possibly be liable for disobeying the provisions as to permanent buildings when he has the sanction of the local authority to dispense with them. If he does not choose to take the trouble to make any application to the local authority he appears to me not to be deserving of any particular sympathy.

For those reasons I think that the judgment of Atkin J. on the second point was wrong, and I agree with the judgment of the Lord Chief Justice.

LORD READING C.J. The appeal will be allowed with costs, the judgment set aside, and in lieu thereof judgment entered for the defendants with costs.

Solicitors for appellants: *Hamlins, Grammer & Hamlin, for Thompson & Mathison, Birkenhead.*

Solicitors for respondent: *Pritchard, Englefield & Co., for Horrocks & Christian Jones, Liverpool.*

A. L.

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April 5.

HAIGH *v.* AERATED BREAD COMPANY, LIMITED.

Adulteration—Article of Food mixed with Ingredient rendering it injurious to Health—Sale of "preserved Cream"—Cream mixed with Boric Acid—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 3, 5.

The appellant, an inspector under the Sale of Food and Drugs Acts, asked for, and was supplied by the respondents with, a shillingsworth of "preserved cream." On analysis this was found to be cream with which boric acid had been mixed. "Preserved cream," that is to say, a mixture of cream and boric acid, is sold as a well-known commodity, but it was found that cream containing boric acid in any quantity is injurious to health, more particularly in the case of children and of invalids:—

Held, that although the article was sold as a mixed article, namely, "preserved cream," the respondents had, within the meaning of s. 3 of the Sale of Food and Drugs Act, 1875, sold an article of food, namely, cream, with which an ingredient, namely, boric acid, had been mixed which rendered the cream injurious to health, and therefore that they were liable to the penalty imposed by that section.

Observations of Darling J. in *Cullen* v. *McNair* (1908) 99 L. T. 358 not followed.

CASE stated by a metropolitan police magistrate.

An information was preferred against the respondents, who carried on the business of refreshment providers, for having on June 28, 1915, at 216, Piccadilly, contrary to s. 3 of the Sale of Food and Drugs Act, 1875 (1), unlawfully and wilfully sold to the appellant, a sanitary inspector for the city of Westminster, a certain article of food, to wit, cream, which was mixed with 0·34 per cent. by weight of boric acid so as to render it injurious to health.

(1) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 3: "No person shall mix . . . . any article of food with any ingredient or material so as to render the article injurious to health, with intent that the same may be sold in that state, and no person shall sell any such article so mixed . . . . under a penalty in each case not exceeding fifty pounds for the first offence . . . ."

Sect. 5: "Provided that no person shall be liable to be convicted . . . . in respect of the sale of any article of food . . . . if he shows to the satisfaction of the justice or court before whom he is charged that he did not know of the article of food . . . . sold by him being so mixed . . . . and that he could not with reasonable diligence have obtained that knowledge."

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The following facts were proved or admitted :—

On June 28, 1915, the appellant demanded, and the respondents supplied to him, at their depot at 216, Piccadilly, one shillingsworth of preserved cream. The appellant notified to the respondents' assistant who sold the cream his intention to have the cream analysed, and he duly divided the cream into three parts. The analyst stated, and the magistrate found as fact, that the cream contained boric acid in the proportion above stated. Cream containing boric acid in any quantity is injurious to health, more particularly in the case of children and of adults who are invalids, especially in the case of persons suffering from kidney disease. Preserved cream, that is to say, a mixture of cream and boric acid preservative, is sold as a well-known commodity.

The appellant contended that the respondents had sold an article of food, namely, cream mixed with an ingredient, namely, boric acid, so as to render the same injurious to health, and had thereby committed an offence under s. 3 of the Sale of Food and Drugs Act, 1875, notwithstanding that they had sold the cream as preserved cream.

The respondents contended that the appellant had demanded preserved cream and had received the same, and that as preserved cream was a mixed article of food there had been no mixing within the meaning of s. 3.

The magistrate was of opinion that no offence had been committed, as the cream was bought and sold as preserved cream, and that though boric acid in the proportion found in the cream was injurious to health, yet, having regard to the case of *Cullen* v. *McNair* (1), he felt bound to dismiss the information.

The question for the opinion of the Court was whether the magistrate came to a correct decision in point of law.

McCall, K.C. (*Bartley* with him), for the appellant. The object of the Sale of Food and Drugs Act, 1875, as was said by Lord Coleridge C.J. in *Dyke* v. *Gower* (2), is not to punish the seller, but to protect the buyer, and to ensure that he shall receive what the Act says he is entitled to receive. Sect. 3 of the Act prohibits, inter alia, the sale of an article of food which has been mixed with any ingredient so as to render the article injurious to health, and the only possible defence

(1) 99 L. T. 358. (2) [1892] 1 Q. B. 220, 223.

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to a charge of contravening that section is under s. 5, which protects the seller if he can show that he did not know that the article sold by him was so mixed and that he could not with reasonable diligence have obtained that knowledge. The present respondents cannot set up that defence and are consequently liable to the penalty imposed by s. 3. The decision in *Cullen* v. *McNair* (1) in no way supports the magistrate's view, and the observations therein of Darling J. were entirely obiter.

[He was stopped.]

W. E. Bousfield, for the respondents. The magistrate was right in the view he took. To sell something which in consequence of the mixture of two ingredients constitutes a new article is not an offence under s. 3. For that section to apply, the article at the end of the mixing operation must for all practical purposes be the same as it was before the operation of mixing was carried out. In this case after the boric acid was mixed with the cream a new and well-known article was produced, namely, preserved cream—an entirely different article from cream. Nothing was mixed with the preserved cream. In *Cullen* v. *McNair* (1) the article sold was sold as "cream" and what was supplied was "preserved cream," and it was held that an offence had been committed against s. 3. In that case Lord Alverstone C.J. said that "where there is a sale of cream simpliciter and an article of this kind given, it was open to the magistrates to find as a fact that the article sold was injurious to health within the meaning of the section." The Lord Chief Justice based his decision entirely upon the fact that the sale was of "cream," but Darling J. expressed the view that if it had been bought and sold as "preserved cream" the thing to be regarded as the article of food would be the preserved cream as sold and indicated on the pot, and, there having been nothing mixed with that article, no offence would in those circumstances have been committed. Those observations are precisely applicable in this case.

RIDLEY J. In my opinion the magistrate came to an erroneous decision. He appears to have acted on some observations made by Darling J. in *Cullen* v. *McNair* (1), but that case was decided otherwise.

[His Lordship, having stated the facts, continued:] The argu-

(1) 99 L. T. 358, 361.

ment addressed to us was that preserved cream having become a well-known commodity was no longer a mixed, but was an unmixed, article of food, and, therefore, that the respondents could only be guilty of an offence against s. 3 if they added something fresh to it. I can see no foundation for that argument. Sect. 3 is very different from s. 6, and I cannot help thinking that the magistrate did not distinguish between those sections. If under s. 3 it is shown that an article of food—cream in this case—has been mixed with an ingredient—boric acid in this case—so as to render it injurious to health, the person selling it is liable to be convicted unless he can establish under s. 5 that he did not know, and could not with reasonable diligence have ascertained, that the article was so mixed. The respondents do not come within the protection of that section, and on the facts of this case the magistrate ought to have convicted the respondents. The case must be remitted to him in order to convict.

BRAY J. I agree. Sect. 3 is perfectly plain. It says, first, that no person shall mix any article of food with any ingredient so as to render the article injurious to health with the intent that the same may be sold in that state, and, secondly, that no person shall sell such article so mixed. Cream is an article of food, and it is found that cream mixed with boric acid is injurious to health. As the respondents do not come within the protection of s. 5 they are liable to the penalty imposed by s. 3.

AVORY J. I agree, and I only desire to add that the magistrate appears to have treated the judgment of Darling J. in *Cullen* v. *McNair* (1) as if it had been the judgment of the Court. Either that case is a decision against the present respondents or it has no application to this case at all. In one sense it is a decision against them, because it decided that a person who mixed boric acid with cream committed an offence under s. 3. As the appellant in that case had sold not preserved cream, but cream, Darling J.'s observations were entirely obiter, and I may say that I do not agree with them.

Appeal allowed.

Solicitors for appellant: *Allen & Son.*

Solicitors for respondents: *Bristows, Cooke & Carpmael.*

(1) 99 L. T. 358, 361.

J. S. H.

C. A.

1916

Feb. 21; *March* 11.

[IN THE COURT OF APPEAL.]

INLAND REVENUE COMMISSIONERS *v.* SHEFFIELD AND SOUTH YORKSHIRE NAVIGATION COMPANY.

Revenue—Increment Value Duty—Minerals comprised in a Mining Lease—Lease for Term not exceeding Fourteen Years—Exemption from Duty—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 1, 22.

Increment value duty is, under s. 22 of the Finance (1909-10) Act, 1910, chargeable upon minerals comprised in a mining lease even if the lease is for a term not exceeding fourteen years.

Decision of Rowlatt J. [1915] 1 K. B. 725 affirmed (dissentiente Phillimore L.J.).

APPEAL from a decision of Rowlatt J., reported [1915] 1 K. B. 725.

The Commissioners of Inland Revenue appealed from the decision of a referee under the Finance (1909-10) Act, 1910, upon the question of the liability of certain minerals to an assessment to annual increment value duty, under Part I. of that Act.

The minerals were comprised in a mining lease granted in 1909 by the company for the term of ten years from January 1, 1910. Increment value duty of 57*l.* was, in respect of the year 1912-13, assessed by the Commissioners upon the minerals comprised in the lease, under s. 22 of the Finance (1909-10) Act, 1910. (1)

(1) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 1: "Subject to the provisions of this Part of this Act, there shall be charged, levied, and paid on the increment value of any land a duty, called increment value duty, at the rate of one pound for every complete five pounds of that value accruing after the 30th day of April, 1909, and—

"(*a*) on the occasion of any transfer on sale of the fee simple of the land or of any interest in the land, in pursuance of any contract made after the commencement of this Act, or the grant, in pursuance of any contract made after the commencement of this Act, of any lease (not being a lease for a term of years not exceeding fourteen years) of the land; . . . . the duty . . . . shall be collected in accordance with the provisions of this Act."

Sect. 22: "(1.) No reversion duty shall be charged on the determination of a mining lease, and no increment value duty shall be charged on the occasion of the grant of a mining lease or in respect of minerals which are comprised in a mining

Against this assessment the company appealed upon the ground that "As the term of the lease is for ten years only it is claimed that the lease comes within the exception contained in s. 1 (*a*) of the Finance (1909-10) Act, 1910."

Upon the hearing before the referee it was agreed that there was no dispute as to the figures, and that the sole question in issue was the question of exemption from duty. The referee decided that the lease in question, being for a term of ten years from January 1, 1910, came within the exemption, in s. 1 (*a*), of "a lease for a term of years not exceeding fourteen years of any land," and that therefore no increment value duty was payable. Rowlatt J. reversed this decision, and the company appealed.

Lowenthal, for the appellants. The only charge of increment value duty is contained in s. 1, and that charge is imposed by the whole of the section, the latter part of which is not merely a provision for collection of the duty. There is no other charge of this duty to be found in the Act; no charge of duty is imposed by s. 22. By s. 1 the duty is charged solely with reference to the three stated

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lease, or are being worked, except as a duty payable annually in manner provided by this Act.

"(3.) Increment value duty in respect of the increment value of minerals which are comprised in a mining lease or are being worked shall, where that duty is chargeable, be charged annually; and the increment value shall, instead of being estimated as a capital sum, be taken to be the sum (if any) by which, in each year during which the lease continues or the minerals are being worked, as the case may be, the rental value on which mineral rights duty is charged in respect of the right to work the minerals exceeds the annual equivalent of the original capital value of the minerals, or the capital value of the minerals on the last preceding occasion on which increment value duty has been collected otherwise than as an annual duty, if increment value duty has been so collected before the minerals have become comprised in a mining lease or have commenced to be worked; and the annual equivalent of any such capital value of the minerals shall be taken to be two twenty-fifth parts of that capital value.

"(5.) Increment value duty payable annually under this section shall, instead of being collected as provided by this Act in other cases, be recoverable in the same manner as mineral rights duty, with the same right of deduction."

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occasions, which apply to every lease not within the express exemption in favour of leases not exceeding fourteen years. In order to impose a duty there must be found clear words imposing the charge. There are no such words in s. 22. The whole operation of s. 22, in the case of minerals which would otherwise be chargeable upon "occasions" under s. 1, is to substitute an annual duty instead of the duty payable upon "occasions," and, as the duty is not charged by s. 1 upon leases not exceeding fourteen years, s. 22 does not affect those leases: Napier on the New Land Taxes, 2nd ed., p. 564. A tax can be imposed only by direct language: *Partington* v. *Attorney-General.* (1)

Sir Frederick Smith, A.-G., and *W. Finlay, K.C.*, for the Crown. Sect. 1 of the Act charges increment value duty on land and makes an exception in the case of a lease of land for a term not exceeding fourteen years. The words in s. 1, which specially except leases for a term not exceeding fourteen years, are not of general application, but apply only to leases of the surface land. A separate group of sections, ss. 20—25, deal specially and exclusively with minerals under a separate heading of "Mineral rights duty and provisions as to minerals." They introduce many differences between the assessment of ordinary land and the assessment of minerals. Sect. 22, sub-s. 1, provides that increment value duty shall not be payable on the grant of a mining lease or in respect of minerals comprised in a mining lease or being worked, except as an annual duty; sub-s. 3 charges an annual duty upon the increment value of minerals and provides the mode of estimation; and sub-s. 5 provides for the collection of that duty. The subsequent sections provide a special method of valuation. There is, therefore, in the case of minerals comprised in a mining lease, a special code which charges an annual duty, in lieu of the duty payable upon "occasions" under s. 1, and makes no exception in the case of a lease not exceeding fourteen years.

Lowenthal in reply.

Cur. adv. vult.

March 11. LORD COZENS-HARDY M.R. This appeal relates to increment value duty in respect of coal mines. Before dealing with

(1) (1869) L. R. 4 H. L. 100, 122.

the particular facts it is desirable to consider the relevant sections of the Finance (1909-10) Act, 1910. Sect. 1 imposes on the increment value of any "land" a duty called increment value duty. The scheme of the section is reasonably clear, and the following propositions may be stated: (*a*) It is payable only on an "occasion," which is defined as being either a transfer on sale, or the grant of a lease for more than fourteen years, or death. I purposely omit sub-s. (*c*), which relates to corporations. (*b*) The increment is the difference between the site value on the "occasion" and the site value on April 30, 1909, or on any subsequent "occasion"; and the duty is one-fifth of this capital sum. (*c*) The duty is payable by the grantor or lessor, and not by the purchaser or lessee. (*d*) "Land" in s. 1 includes minerals. When we come to s. 22 we find a new code relating to minerals. That which is called increment value duty is made payable in respect of minerals comprised in a mining lease. But the duty bears a very slight resemblance to the duty under s. 1, and it seems a pity that a different name was not given to it. (*e*) It is not charged on the "occasion" of a grant of a mining lease. (*f*) The duty is charged annually, instead of being estimated as a capital sum. (*g*) It is recoverable like mineral rights duty. (*h*) It is called an "increment" value duty, although the value of minerals which are being worked grows less and less, and it is barely possible to suggest a case in which there might be an increment. (*i*) There is no reference to April 30, 1909, except in s. 22, sub-s. 2, where minerals which on that day were comprised in a mining lease are exempted from increment value duty. (*k*) Minerals comprised in a mining lease are treated as a separate parcel of land (s. 23, sub-s. 2). Several difficulties arise in attempting to read s. 1 as modified by s. 22 and s. 23. Is the "occasion" to be wholly disregarded, not only in the case of the grant of a mining lease, but also on the "occasion" of a death? Upon the whole, though not without doubt, I think the duty payable annually begins to be payable and continues to be payable without reference to any "occasion." Sub-s. 3 is obscure, but it professes to lay down certain hypothetical principles by the application of which the annual payment is to be ascertained. Take two imaginary figures and take two twenty-fifths of the difference. The referee has worked out the figures, and his finding on this point is not

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challenged. As to the particular facts, the minerals were comprised in a mining lease dated December 23, 1909, for a term of ten years from January 1, 1910, which lease is vested in the appellants' lessee. On March 13, 1912, a provisional valuation was made, and on November 10, 1913, duty was assessed at 57*l*. An appeal was presented to Mr. Martin, one of the referees. He held that no increment value duty is payable on the ground that a lease for a term not exceeding fourteen years is exempt under s. 1. I am unable to accept this view. The enactment in s. 22, sub-s. 1, that "no increment value duty shall be charged on the occasion of the grant of a mining lease" really repeals the whole of s. 1 (*a*) so far as a mining lease is concerned, and does not leave the fourteen years as a relevant fact. The Commissioners appealed, and Rowlatt J. reversed the decision of the referee and held the duty was payable. I agree with the decision of Rowlatt J. Sect. 22 begins a new code dealing with minerals comprised in a mining lease or being worked. It is necessary to refer to s. 1 to ascertain the rate of duty, namely, 20 per cent., but for no other purpose. Sect. 1 is not the only charging section, for s. 22, sub-s. 3, creates an annual charge. So far as minerals comprised in a mining lease are concerned, the charge in s. 1 is swept away, and a new charge of duty under the old name, but with very different incidents, is substituted. The provision in s. 1 excepting a lease of fourteen years has in truth no relation to the duty payable under s. 22. When once the idea of an "occasion" is given up, and an annual payment dependent upon annual working is the measure of the duty, the conclusion seems to me irresistible that the existence of a lease for more or less than fourteen years is an irrelevant fact.

In my opinion the appeal fails and must be dismissed with costs.

PHILLIMORE L.J. The appellant company by a mining lease dated December 23, 1909, let certain minerals for a term of ten years from January 1, 1910.

Under the Finance (1909-10) Act, 1910, the original capital value of these minerals was fixed at 802*l*. The date of the valuation was March 13, 1912. Two twenty-fifths of 802*l*.—a fraction which is required for the purpose of computing duty under s. 22 of the Act—is approximately 65*l*.

In respect of the year 1912-1913 the rental value of the minerals worked, calculated according to s. 20 of the Act, was 354*l.*

The Commissioners claimed increment value duty on the difference between 354*l.* and 65*l.*, which would be 57*l.* less 17*l.* 14*s.* mineral rights duty already paid. The referee decided against the Commissioners. Rowlatt J. reversed this decision, and it is from his judgment that this appeal is brought.

The appellant company say that there can be no increment value duty because the duty is only collected upon the occurrence of an occasion as provided by s. 1 of the Act, and that no occasion has occurred since the original valuation, the lease being before the date when the Act came into operation, and being, moreover, of too short a term to make an occasion.

The Commissioners, while going to s. 1 for the purpose of establishing the rate of duty, say that it has no further application, and that the actual duty is a special one charged by s. 22, which attaches annually to all minerals comprised in a mining lease made since April 30, 1909, or being first worked since that date—a duty which attaches annually upon a comparison of the rental value of the minerals actually gotten with a decapitalized original capital value, according to the two twenty-fifths scale provided in sub-s. 3 of the same section.

Dealing with land generally the scheme of the Act is set forth in ss. 1, 2, 25, and 26. A comparison is to be made between site values at different epochs (s. 2). The mode of ascertaining site values for the purpose of comparison is provided by s. 25. The starting site value is to be obtained by a valuation which it is intended shall take place over the whole kingdom (s. 26). The notional date of this valuation is put back to April 30, 1909. Then at certain periods called in s. 1 "occasions" the site value of the parcel of land in question is to be ascertained, and the excess of value (if any) of the site value on the occasion (subject to the qualification in s. 3) is to be taken to be the increment value on which duty at the rate of 20 per cent. is to be paid (s. 1). The first occasion becomes the starting point of a new site value. On the second occasion the comparison is made with the first, and so forth. One of the instances of an occasion is the grant of a lease for upwards of fourteen years. The person who is to pay duty is the

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person who has made the profit, the grantor or lessor who has got more for his land, the estate of a testator at whose death the site value is found to have improved, the corporation whose property is found on periodical occasions to have become more valuable.

Sects. 3, 4, 5, and 6 provide for the collection and recovery of this duty. And then there are some sections dealing with special circumstances. Next in the Act come provisions as to reversion duty, which is a kind of supplement to increment value duty. Then comes undeveloped land duty. And then a group of sections (ss. 20, 21, 22, 23, and 24) headed "Minerals Rights Duty and Provisions as to Minerals."

By s. 23 some special provisions are made as to the valuation of minerals. For the site value a capital value is substituted. For the purpose of a valuation under this part of the Act the minerals are to be treated as a separate parcel of land, and if not comprised in a mining lease or being worked shall be treated as of no value as minerals unless the proprietor in his return to the Commissioners for valuation purposes makes his estimate of their capital value. But if the minerals on April 30, 1909, were in a mining lease or being worked by the proprietor, these provisions as to valuation are not to apply so long as the state of things continues.

By s. 20 a mineral rights duty of 5 per cent. is imposed on the rental value, which is, broadly speaking, the rent paid the previous year when the minerals are in lease or when they are being worked by the proprietor, an amount calculated as being equivalent to a rent. The duty is imposed on the lessor or proprietor.

Then comes s. 22, on which the Crown relies. By sub-s. 1 no reversion duty is to be paid on the falling in of a mining lease and (as will be seen by comparing sub-s. 3) no increment value duty upon the grant of a mining lease. By sub-s. 2 increment value duty is not to be charged on minerals which were not on the valuation day, April 30, 1909, in a mining lease or being worked, as long as that state of things continues.

I return to sub-s. 1. As the case turns upon the true construction of this sub-section and sub-s. 3, I must read them in full, though I shall afterwards put my paraphrase on sub-s. 3: "(1.) No reversion duty shall be charged on the determination of a mining lease and no increment value duty shall be charged on the occasion of the

grant of a mining lease or in respect of minerals which are comprised in a mining lease, or are being worked, except as a duty payable annually in manner provided by this Act." "(3) Increment value duty in respect of the increment value of minerals which are comprised in a mining lease or are being worked shall, where that duty is chargeable, be charged annually; and the increment value shall, instead of being estimated as a capital sum, be taken to be the sum (if any) by which, in each year during which the lease continues or the minerals are being worked, as the case may be, the rental value on which mineral rights duty is charged in respect of the right to work the minerals exceeds the annual equivalent of the original capital value of the minerals, or the capital value of the minerals on the last preceding occasion on which increment value duty has been collected otherwise than as an annual duty, if increment value duty has been so collected before the minerals have become comprised in a mining lease or have commenced to be worked; and the annual equivalent of any such capital value of the minerals shall be taken to be two twenty-fifth parts of that capital value."

My paraphrase of sub-s. 3 is as follows: It applies only to minerals which are comprised in a mining lease or are being worked. Where the duty is chargeable it is to be charged annually. The starting point from which the comparison of increment is to be made being a capital value (s. 23), this sum is to be decapitalized into an annuity for twelve and a half years (the average time, I suppose, in which minerals are supposed to be gotten) at two twenty-fifths a year. This capital value is to be either the original capital value, or if the increment value duty has already been collected otherwise than as an annual duty (that is before the minerals have become comprised in a mining lease or been worked), then the capital value on the last occasion when this has happened. The annual value to be compared with the two twenty-fifths annuity is the rental value on which mineral rights duty is charged.

By sub-s. 5 this increment value duty is not to be collected as provided in other cases, but is to be recoverable like mineral rights duty, and by sub-s. 6, when it is paid, the payer pro tanto is relieved of mineral rights duty for that year.

The appellant company say that all these provisions still leave

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the duty as an increment value duty charged, as sub-s. 3 says, on the increment value of minerals, the capital value with which the comparison is to be made being either the original value or that ascertained on the last previous occasion, and the new value being ascertained under sub-s. 3, and that for comparison there must be a new occasion, and that none such has yet arisen.

The Commissioners contend that the duty under s. 22, though called an increment value duty and being at the rate of this duty, is yet not an increment value duty, or is at any rate so dissimilar an increment value duty that none of the provisions of ss. 1 and 2, except that fixing the rate, apply to it; that there is no need of any occasion, and that it may arise in any or every year when minerals are in lease or in working. If this means that there is to be an annual collection of 5 per cent. of the rental value (which is to be called mineral rights duty) plus 15 per cent. of the excess of the rental value over two twenty-fifths of the capital value (which is to be called increment value duty), it might have been more simply expressed; but if it were so expressed it would seem strange that this 15 per cent. should be called increment value duty. For all that it may be so.

Let me come, therefore, to the actual words of the Act. I must start with five lines of s. 1: "Subject to the provisions of this Part of this Act, there shall be charged, levied, and paid on the increment value of any land a duty, called increment value duty, at the rate of one pound for every complete five pounds of that value accruing after the 30th day of April, 1909,"—I must put in the word "but" to connect the two and I go on to s. 22—but "No increment value duty shall be charged on the occasion of the grant of a mining lease or in respect of minerals which are comprised in a mining lease, or are being worked, except as a duty payable annually."

If this sub-section imposes a new duty I should expect some such words as "but in lieu thereof" and not the words "except as." This sub-section cannot be regarded as by itself charging a new duty. Rowlatt J. seems to find the new duty in sub-s. 3: "Increment value duty in respect of the increment value of minerals which are comprised in a mining lease . . . . shall, where that duty is chargeable, be charged annually; and the increment value shall,

instead of being estimated as a capital sum, be taken to be the sum (if any) by which, in each year during which the lease continues . . . . the rental value on which mineral rights duty is charged in respect of the right to work the minerals exceeds the annual equivalent of the original capital value of the minerals, or . . . ."

I agree that the words " where that duty is chargeable " may be satisfied by reference to sub-s. 2, or by reference to sub-s. 1, which excepts " the grant of a mining lease " from the list of " occasions." But the words " increment value duty . . . . shall where that duty is chargeable be charged annually " do not constitute a charge. They refer to some charge otherwise imposed. Where is it ? Not in sub-s. 1, and not in the following words of this sub-section. It is only to be found in s. 1, and that section only imposes the duty when an " occasion " arises.

So much for the contention of the Commissioners. Now let me take the contention on behalf of the appellant company and see whether it works.

Minerals not in lease or working need not be valued at all (s. 23, sub-s. 2). They may, however, on the application of the proprietor, be valued and this may be long before they are put in lease or working; for s. 22, sub-s. 3, contemplates the possibility of an occasion arising before they are put in lease or work. In such a case, if there be an increment value, it must be assessed and collected like the ordinary increment value duty. Then they are let on a short lease or put in working. No " occasion " arises.

The lease is not such an alienation as is contemplated in s. 1. But still a mining lease is in a sense a sale of the minerals. And, therefore, I suppose, by way of compromise the mineral rights duty of 5 per cent. is imposed. Then comes an " occasion." Then, if minerals were to be treated like other hereditaments, the inquiry would be made what was the original capital value of the minerals, or if there had been a previous occasion what had been their capital value taken on that occasion, and a comparison would be made of the one or the other with what the minerals were now to realize, and so the increment value would be ascertained, and on this increment value (subject to the 10 per cent. proviso in s. 3, sub-s. 5) the increment value duty would be imposed.

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But the minerals which are left are not likely to show an increment value. Normally they will show a decrement value. Still there may have been a substantial increment value to the proprietor. The lode or seam may prove richer or more accessible than was expected. A valuation of minerals may well have an element of conjecture such as does not exist for a valuation of surface. Or if the royalties be (as they may be) calculated on price and not on ton, the price of the mineral at the pit's mouth may have risen. If the ordinary course were followed and the appropriate increment value duty were to be paid as a fraction of a capital sum, it would be necessary to calculate "the capital value on the new occasion," say a sale, by taking two figures, the price at which the balance or residue of the minerals is being sold and the value of the minerals already sold, and comparing their sum with the previous capital value. It could be done, though I see difficulty in doing it.

But as it is provided in this case that the increment value duty shall be charged annually, if the previous capital value can be decapitalized into an annuity the rental value will give one term of comparison and the annuity the other, and the calculation becomes automatic. The measure of decapitalization is provided by the conventional two twenty-fifths standard. Let me put a case as an illustration. The capital value of the minerals has been ascertained. An occasion arises. The mine has then been in work two and a half years. On the conventional assumption five twenty-fifths of the capital value (x) have been extracted and twenty twenty-fifths only should remain. But the capital value by the time of the occasion has risen to $x + y$ either because it was always so, though the fact was not known, or it might be by minerals becoming accessible which were thought to be inaccessible, or by reason of a rise in prices. This rise in value will show itself either in the rental values being in future two twenty-fifths of x plus y, or in the rental value continuing after the twelve and a half years are over; and this excess or continuance is the measure of the increment value.

If perchance the proprietor had never had his minerals valued, so that they stand at zero, the whole of the annual rental value would be in excess of the decapitalized capital and therefore increment value. In this way force is given to every part of the sections in question and every case is covered. No second duty, called but

not being increment value duty, is charged. The rate of duty is ascertained by the introduction of s. 1 instead of divorcing the first five lines from the rest and introducing them only. The chief objection that I can see is that the incidence of the duty is anomalous. It falls upon the purchaser or devisee. There is no difficulty about its recovery. It is to be collected from the actual lessor for the time being. I doubt whether Rowlatt J. appreciated this. His judgment contains a passage about the executors having to pay the duty for the whole of the remainder of the term.

But the incidence is anomalous. It must, however, be so if the duty is to be an annual charge on annual returns; and the purchaser can make allowance for it in the price he pays. As between devisee or executor, it is not a serious objection that the devisee should have to take cum onere. There is another objection that the comparison in any one year of the conventional two twenty-fifths with the actual returns may produce cases of accidental hardship. This is so. I imagine that the fasciculus of sections as to minerals is the embodiment of a series of compromises made while the statute was passing through Parliament, and may well be expected to show signs of hasty and not wholly considered drafting. But rough and ready as this mode of computation is, it is confined to cases where an "occasion" arises during the currency of a lease or working. The Commissioners would apply it with all its imperfections to every case where minerals were in lease or working and to every year except perhaps the first.

The Attorney-General was asked what was the reason for imposing this duty which in his view was not a true increment value duty, and which might and generally would arise when there was no increment value. He said it was a duty on quick working. Why should quick working effect a rise of duty from 5 to 20 per cent.? The Crown profits by quick working. It gets its 5 per cent. quicker.

We have no explanation how it comes about in the present case that the rental value between two and three years after the grant of the lease should be over five times the two twenty-fifths. But let us take it as an instance and for clearness take an excess at five times only. If this be a normal year the minerals will be gotten in two and a half years as against twelve and a half, and the result

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is to impose upon the lessor, who cannot prevent his lessee's quick working (and who gets no more rent in the total), a duty of either 17 or 16 per cent., according to the different constructions which may be put on s. 22, sub-s. 6, instead of 5 per cent. (one fifth of four fifths plus one twentieth of one fifth equals four twenty-fifths plus one hundredth equals sixteen hundredths plus one one-hundredth; or one fifth of four fifths equals four twenty-fifths equals sixteen hundredths).

But there is a more serious difficulty. The year may not be normal. When the Legislature decapitalized at two twenty-fifths per annum it was as an average only. I suppose that at the first start of a mine preliminaries take time and so much mineral is not gotten. Then when the mine gets in swing more comes, and the quantity decreases gradually as the further or deeper parts are reached. It may be that at intervals difficulties are encountered which delay and make the yearly yield small, and then a fat year comes. Obviously whenever there is a yield of less than two twenty-fifths in one year there must be more than two twenty-fifths in another; and yet the accidental excess is to be taxed at 15 per cent. extra, subject to the allowance in s. 22, sub-s. 6, without any compensation when the lean year comes.

I may observe as a final remark that the contention of the Commissioners might make the minutest excess over the two twenty-fifths chargeable, for s. 3 is to have no bearing on this duty; unless this is prevented in some way by the operation of s. 22, sub-s. 6.

I think that the contention of the Commissioners is wrong and that there is only one duty—the true increment value duty.

This being so, the duty is only to be levied on one of the occasions specified in s. 1, other than the grant of a lease. No such occasion has happened, and the appellant company is entitled to judgment.

WARRINGTON L.J. The Finance (1909-10) Act, 1910, came into operation on April 29, 1910.

Prior to this date, but subsequently to April 30, 1909, namely, on December 23, 1909, the appellants, the Sheffield and South Yorkshire Navigation Company, granted a lease of a certain coal seam for a term of less than fourteen years, to wit for ten years, from January 1, 1910. The length of the term, however, has in my opinion no

bearing on the question we have to decide. The original value of the minerals was ascertained under the Act to be 802*l.*

In the year 1912-13 the lessors actually received in rent and royalties 354*l.*, or, to use the term used in the Act, the rental value for the year was that sum. The annual equivalent of the capital sum of 802*l.* is under s. 22, sub-s. 3, of the Act two twenty-fifths of that sum, namely, in round figures 65*l.* The Crown claim to treat the difference between 354*l.* and 65*l.* as increment value and to be entitled to increment value duty, namely, one-fifth thereof.

The company contend that increment value duty, whether in the case of minerals comprised in a mining lease or being worked or in the case of land generally, can be collected only on the occasions mentioned in s. 1. None of these occasions has happened in this case, and the company therefore say no duty is payable. Rowlatt J. has decided in favour of the Crown. The company appeal.

The question turns on the construction of the statute, and in addressing myself to this question I bear in mind what was said by Lord Cairns in *Partington* v. *Attorney-General* (1): "As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

Before coming to the sections the construction of which is strictly in question there are one or two points to be borne in mind. (1.) For the purposes of valuation under Part I. of the statute minerals are to be treated as a separate parcel of land, and (2.) minerals so treated, if they are being worked either by a lessee or by an owner, are normally decreasing in value year by year or even day by day as portions of them are removed and sold. One would expect, therefore, to find that the words "increment value" when used in reference to

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this particular parcel of land would not have the same meaning as they have when used in reference to land in the ordinary sense.

I now come to consider the sections directly in question. The first is s. 1: "Subject to the provisions of this Part of this Act, there shall be charged, levied, and paid on the increment value of any land a duty, called increment value duty, at the rate of one pound for every complete five pounds of that value accruing after the 30th day of April, 1909." This creates a duty at the rate therein mentioned on what is called the increment value of land. The section then provides for its collection on certain occasions. It is obvious that in the case of land in the ordinary sense, if changes of value have to be considered, some periods must be selected for comparison, and accordingly the statute fixes on transfers by alienation (including alienation by lease for upwards of fourteen years) and by death, and in the case of corporations, who are immortal, certain fixed periods.

The statute then by s. 2 proceeds to define increment value as the amount by which the site value of the land on the occasion on which the increment value duty is to be collected exceeds the original site value and formulates certain rules by which the original site value and the site value on the subsequent occasion respectively are to be ascertained. The notion of site value is inappropriate to minerals, at all events to those which are being worked, and one would expect to find some special provisions with regard to them. This expectation is not disappointed, for a whole fasciculum of sections appears under the heading "Mineral Rights Duty and Provisions as to Minerals." Sect. 23 provides means of ascertaining the value of minerals and in particular what is called the capital value, and enacts (in sub-s. 3) that minerals which are comprised in a mining lease or are being worked shall be treated as a separate parcel of land not only for the purposes of valuation but also for the purpose of the assessment of duty; and further (by sub-s. 4) that, except where the context otherwise requires, any references in Part I. of the Act to the site value of land shall in cases where the land consists solely of minerals or comprises minerals be construed so far as respects the minerals as a reference to the capital value of the minerals.

We are now in a position to consider s. 22, on which the question

mainly turns. This section provides by sub-s. 1, reading it shortly, that no increment value duty shall be charged in respect of minerals which are comprised in a mining lease or are being worked, except as a duty payable annually in manner provided by the Act. Sub-s. 2 exempts from increment value duty minerals which were on April 30, 1909, either comprised in a mining lease or being worked by the proprietor so long as this state of things continues. Sub-s. 3 is as follows: "Increment value duty in respect of the increment value of minerals which are comprised in a mining lease or are being worked shall, where that duty is chargeable, be charged annually; and the increment value shall, instead of being estimated as a capital sum, be taken to be the sum (if any) by which, in each year during which the lease continues or the minerals are being worked, as the case may be, the rental value on which mineral rights duty is charged in respect of the right to work the minerals exceeds the annual equivalent of the original capital value of the minerals, or the capital value of the minerals on the last preceding occasion on which increment value duty has been collected otherwise than as an annual duty, if increment value duty has been so collected before the minerals have become comprised in a mining lease or have commenced to be worked; and the annual equivalent of any such capital value of the minerals shall be taken to be two twenty-fifth parts of that capital value." The increment value, therefore, in the case of minerals comprised in a mining lease or being worked is not, as in the case of land generally, represented by an increase in the value of the land from one period to another, but is the excess in any one year of the rental value over the assumed normal rental value, namely, two twenty-fifths of the capital value, and is to be charged annually. This last point is made clear by sub-s. 5, which provides that increment value duty payable annually shall, instead of being collected as provided by the Act in other cases, be recoverable in the same manner as mineral rights duty, namely, as a debt due to His Majesty from the proprietor of the minerals where the proprietor is working the minerals and in any other case from the immediate lessor of the working lessee. The immediate lessor in the present case is the appellant company. "Rental value" is defined by s. 20, sub-s. 2. This in the present case is, for the year 1912-13, the 354*l.* mentioned above.

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I now go back to s. 1 and consider it having regard to the directions given by s. 22, and I find that in the case of the minerals in question increment value is the excess in any one year of the rental value in that year over two twenty-fifths of the capital value, and that a duty of 1*l.* for every complete 5*l.* of that excess is to be charged, levied, and paid, and that it is to be so charged, levied, and paid annually; and I ask myself whether the second branch of the section relating to the occasions on which it is to be collected has any reference to this duty. In my opinion it has not. In the first place provisions obviously referring to possible increase in site value are irrelevant and unmeaning when applied to an annual excess such as is defined by s. 22, sub-s. 3; and in the second place I think s. 22, sub-s. 5, expressly excludes, in the case of minerals comprised in a mining lease, the second branch of s. 1, which refers exclusively to collection.

In my opinion the increment value duty on the excess 354*l.* over 65*l.* became payable for the year 1912-13, the judgment of Rowlatt J. was right, and this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for appellants: *Johnson, Weatherall & Sturt.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

H. C. R

[IN THE COURT OF APPEAL.]

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MONTGOMERY *v.* BLOWS.

Employer and Workman—Compensation—Death from Accident of Father of Married Woman living with her Husband—Contribution by Father to Household Expenses in Consideration of Board and Lodging—Partial Dependency—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13; *Sched. I., par.* 1 (*a*).

The applicant, a married woman living with her husband and five children, claimed to be partially dependent upon her father, who was killed by an accident arising out of and in the course of his employment by the respondent. For five years before his death the deceased had lodged with the applicant and her husband, paying 13*s.* a week towards the household expenses, rendering certain services, and making occasional presents to his daughter. Her husband earned 2*l.* 9*s.* a week, out of which he allowed her 23*s.* for the housekeeping of the family, she being under the mistaken idea that his wages were only 30*s.* a week. The household expenses amounted to 36*s.* a week. In an arbitration under the Workmen's Compensation Act, 1906, the county court judge estimated that the total profit derived from the excess of the father's payments, services, and gifts was about 3*s.* a week; but he found as a fact that the applicant was not a dependant:—

Held, that his award was right. The husband provided the home and the whole means of living; if there was any profit arising from the deceased's payments it belonged to the husband, and if there was any dependency it was that of the husband, who could not claim as a dependant under the Act.

Appeal from an award of the judge of the Romford and Ilford County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant in this case was a married woman, who lived with her husband and five children. She claimed to be partially dependent upon her father, who was killed by an accident arising out of and in the course of his employment by the respondent. For five years prior to his death the father had lodged with the applicant and her husband, paying 13*s.* a week towards the household expenses, rendering certain services, and giving the applicant occasional presents. The husband earned on an average

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2*l.* 9*s.* a week, out of which he allowed the applicant 23*s.* for the housekeeping of the family, she being under the mistaken impression that his wages were only 30*s.* a week. The household expenses amounted to 36*s.* a week. The applicant in her evidence stated that she would have charged an ordinary lodger 11*s.* a week, and that out of the 13*s.* received from her father she expended 8*s.* on him and the rest on her children. The county court judge held that there was no dependency. He estimated the total profit derived from the excess of the father's payment and the services and gifts which he gave at about 3*s.* a week, and fixed the total sum which she should receive if she were found to be dependent at 15*l.* 12*s.*; but upon the evidence he found that she was not dependent upon her father. The husband was responsible for the home and provided the means for carrying it on. If any profit accrued from the money contributed by his father-in-law the husband was entitled to it. If there was any dependency, it was that of the husband and not of the wife, and the husband could not claim as a dependant of the deceased.

The applicant appealed.

O'Malley, for the appellant. This is a case of partial dependency. The fact that the wife was dependent upon her husband does not prevent her from being partially dependent upon her father: *Hodgson* v. *West Stanley Colliery*. (1) The question of dependency turns upon the particular facts of each case; the expression is nowhere exhaustively defined. The test is what are the actual means of living and the expenditure. In *Main Colliery Co.* v. *Davies* (2) a father was held to be in part dependent upon the earnings of his child; and in *Moyes* v. *Wm. Dixon, Ld.* (3) a daughter who was able to earn, and had been in the habit of earning, her living by doing outdoor work, and who kept house for her father, was held to be dependent upon him. The county court judge has wrongly drawn a legal presumption from the contract that there was no dependency. If he had found as a fact that the contract was for the benefit of the husband only the appellant would have had no case. In *New Monckton Collieries*

(1) [1910] A. C. 229. (2) [1900] A. C. 358.
(3) (1905) 42 Sc. L. R. 319.

v. *Keeling* (1) Lord Atkinson pointed out that the question of dependency was purely a question of fact, and should be decided irrespective altogether of any legal presumption.

Dependency may exist even where the alleged dependant is able to maintain himself without assistance from the deceased : *Howells* v. *Vivian & Sons.* (2)

T. E. Haydon, for the respondent. There is no question here of a common fund out of which the family were maintained, as in *Hodgson* v. *West Stanley Colliery.* (3) Applying the test laid down by Lord Halsbury in *Main Colliery Co.* v. *Davies* (4), and acted on ever since, here it was revealed that the husband was in fact earning wages which were ample to maintain his wife and family, and the county court judge has found as a matter of fact that there was no dependency of the wife upon her father.

Lord Robson in *New Monckton Collieries* v. *Keeling* (1) said that compensation to a dependant was made in respect of actual pecuniary loss by the death of the workman, and when there is no real detriment to the applicant's pecuniary position the arbitrator may find that there is no dependency, even in the case of a widow. Here the pecuniary detriment, if any, was not suffered by the applicant, but by her husband. Any benefit under the contract of lodging belonged to the husband and not to the wife : *Birkett* v. *Birkett* (5) ; *Barrack* v. *M'Culloch.* (6)

If the appeal succeeds the husband will benefit, and he clearly cannot be a dependant.

O'Malley in reply referred to *Tamworth Colliery Co.* v. *Hall.* (7)

Cur. adv. vult.

March 27. LORD COZENS-HARDY M.R. I agree with the judgments which are about to be pronounced.

PHILLIMORE L.J. The applicant claimed to be dependent on her father, a workman who was killed by an accident. The county court judge has found that she was not a dependant and she appeals.

(1) [1911] A. C. 648.
(2) (1901) 85 L. T. 529.
(3) [1910] A. C. 229.
(4) [1900] A. C. 358.
(5) (1908) 24 Times L. R. 284.
(6) (1856) 3 K. & J. 110.
(7) (1911) 4 B. W. C. C. 313.

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It appears that she is a married woman living with her husband, who is a general labourer, and has five young children. Her husband earned on an average 2*l.* 9*s.* a week, but his wife thought that his earnings were 30*s.* only. Out of that he allowed her 23*s.* for the housekeeping of the family. Five years ago her father, who was apparently a widower, came to lodge with the family on the terms that he paid 13*s.* a week. He had his board and lodging, and she did his washing. On the other hand, he bought some clothing which he gave to the wife and children, and he mended the family boots.

At one time several years ago the applicant had a lodger whom she charged 11*s.* a week. The county court judge has estimated the total profit derived from the excess of the father's payment and the services and gifts which he rendered at about 3*s.* a week, and has fixed the total sum which she should receive if this Court should deem her to be a dependant at 15*l.* 12*s.*

But upon the evidence he has found that she is not a dependant. And if this be a finding of fact and he has rightly directed himself upon the law there is no power in this Court to review his finding; but it is contended that he has mistaken the rule of law. I agree so far with the applicant's contention that the mere fact that the daughter received this money under contract is not a sufficient bar to her claim as a dependant. In every case in which a wage-earner, not being husband or wife, lives with his relations and contributes regularly towards the family housekeeping the legal nexus may be rightly deemed one of contract. But the beneficial overplus beyond the cost of his maintenance may be a gift, and may constitute the receiver, if in a sufficiently close family relation, a dependant who can establish a claim under the Workmen's Compensation Act.

It is possible, upon a close criticism of the judge's judgment, to find passages in which he appears to have laid too much stress upon the contractual relation. But his judgment rests upon more solid ground. Dependency is a question of fact: see *Main Colliery Co.* v. *Davies* (1); *Hodgson* v. *West Stanley Colliery* (2); *New Monckton Collieries* v. *Keeling.* (3)

(1) [1900] A. C. 358. (2) [1910] A. C. 229.
(3) [1911] A. C. 648.

Now in this case the upkeep of the family cost 36*s.* a week, plus whatever amount the husband would require for his outside expenses. Upon the facts there is no reason to suppose that they were more than 7*s.* a week, total 43*s.*, plus the value of the father's gifts and services. The income of the family was the 2*l.* 9*s.*, plus the 13*s.* = 62*s.*, plus the father's gifts and services; and 3*s.* a week, being the benefit on the 13*s.* and the gifts and services of the father, has been lost by his death. But to whom has it been lost? If to the wife, she would be a dependant. If to the husband, he is not a dependant within the meaning of the Act.

It seems to me that it is a loss to the husband. The contract was no doubt made with the wife, but I apprehend as agent for her husband. He provided the house, and if there was a saving on her housekeeping allowance the money saved would be the husband's: *Barrack* v. *McCulloch* (1); *Birkett* v. *Birkett*. (2)

There was ample "for the means of living" of the family without recourse to this 3*s.*, and the wife did not depend upon it as part of "her income or means of living," which is the test put by Lord Davey in the *Main Colliery Case* (3) and assented to by Lord Brampton in the same case.

It might be said, using the word "income" in a larger sense, that the husband did depend upon it as part of his income, or even as part of his "income or means of living"; but the husband is not a dependant. The wife has sustained no "actual pecuniary loss" by her father's death, to apply the words of Lord Robson in the *New Monckton Case*. (4) The husband has indeed 3*s.* a week less to dissipate or, as one may hope, to save. He might, instead of making the wife his agent to receive the money paid by her father, have taken it himself and then out of the total income allowed the wife what was thought proper, which should have been a little less than 13*s.* a week more during the father's life and 3*s.* a week more since his death.

It seems to me a mere question of accountancy whether the money, gifts, and services paid or rendered by the father were treated in this way or were treated in the way in which they were in fact treated. The application was an endeavour to convert

(1) 3 K. & J. 110.
(2) 24 Times L. R. 284.
(3) [1900] A. C. 358.
(4) [1911] A. C. 648.

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the husband into a dependant of the wife's father, and I think fails.

Lord Macnaghten's language in *Hodgson's Case* (1), adopting a part of Lord Halsbury's judgment in the *Main Colliery Case* (2), "What the family was, in fact, earning, what the family was, in fact, spending, for the purpose of its maintenance as a family, seems to me to be the only thing which the county court judge could properly regard," is appropriate; only that here we must not consider what the family was earning, because the earning family includes some one who is not a dependant, and we must only look at what the family was in fact spending. Indeed, I have included in what the family was spending more than I need, because part of the expenditure was by the husband and for his benefit.

I adopt the words of the county court judge: "The husband carries on the house and the whole means of living is provided by him; if any profit came from the money, the husband was entitled to it. If there was any dependency it was the dependency of the husband and not of the wife." I think that the appeal should be dismissed.

SARGANT J. I agree that this appeal should be dismissed.

I cannot find that in the careful reasons which the county court judge gave for arriving at his conclusion of fact he in any way misdirected himself.

The interesting argument of Mr. O'Malley depended mainly on focussing attention exclusively on the position of Mrs. Montgomery, treating her as the central figure, and then inquiring whether in view of the 23*s.* only which she was allowed by her husband and the 13*s.* she actually received from her father she was a dependant of her father. It was of course necessary to take this line, for Mr. Montgomery himself was not so related to the deceased workman as to be able to claim as a dependant, whatever his loss in fact.

But I think that the learned county court judge was right in declining to take this view and in addressing his mind mainly to the position of Mr. Montgomery, who in fact supplied, through

(1) [1910] A. C. 229, 236. (2) [1900] A. C. 358.

his wife, the food and lodging for which the deceased paid. As between Mr. Montgomery, at any rate, and the deceased the position of the latter seems to have differed but little from that of an ordinary lodger, especially if regard is had to an admitted answer of the claimant which was not in the learned judge's notes, to the effect that she supplied her father better than she would have done a lodger. And when regard is had to the unexpected financial reserves disclosed by Mr. Montgomery in the course of the case, it is difficult to see how the family and Mrs. Montgomery as a member of it were really in any ordinary sense of the term dependent on the deceased.

I think I should add also that the element of a common family fund on which so much stress has been laid in many of the cases hardly existed here as between the deceased and the members of the Montgomery family as a whole. The deceased did not bring in his whole earnings or more of them than was roughly equivalent to the services rendered to him. And what he brought in was pooled, not with the family earnings as a whole, but only with that comparatively small part of these earnings which Mr. Montgomery chose to allow his wife under a system which appears to have amounted to at least a suppression of truth, if not a suggestion of falsehood.

Solicitor for appellant: *W. Daybell, Stratford.*
Solicitors for respondent: *Rising & Ravenscroft.*

G. A. S.

1916
March 28.

WARBURTON AND ANOTHER *v.* CO-OPERATIVE WHOLESALE SOCIETY, LIMITED.

Master and Servant—Workman receiving Compensation for Injury—Whether Relation of Master and Servant terminates—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58).

The fact that a workman receives compensation under the Workmen's Compensation Act, 1906, from his employer during temporary incapacity for work resulting from injury received by him during the course of his employment does not, of itself, terminate the employment, even though the contract of employment is merely at will.

Judgments in *Elliott* v. *Liggens* [1902] 2 K. B. 84 explained and followed.

APPEAL by the defendants from a judgment of the judge of Rochdale County Court.

The action was brought by the plaintiffs, Warburton and his wife, to recover the sum of 35*l.* 2*s.* alleged to be due by the defendants under an agreement whereby the defendants agreed with the male plaintiff that on his volunteering for service with the Regular Army of His Majesty's Forces they would pay full wages less Government allowances and thrift fund contributions, the payments to be made to his wife. The particulars of claim, which were dated November 29, 1915, alleged that under the agreement there was then due the sum of 35*l.* 2*s.*, made up as follows: "May 17 to November 23, 1915. To 27 weeks at 26*s.* (40*s.* less 14*s.* Government allowance and thrift fund contribution) 35*l.* 2*s.*"

The male plaintiff had been an "overlooker" in the employment of the defendants at their weaving shed at Bury, Lancashire. On February 7, 1914, he met with an accident, in consequence of which he was unable to work, and the defendants admitted liability to the extent of 1*l.* a week, being half the amount of his wages, and paid that sum to the plaintiff as workmen's compensation up to April 30, 1914. He then was so far recovered that he thought he could do his work again, and accordingly he returned to work. It was found that he could not do his work satisfactorily, but other

overlookers helped him in return for his paying them 10*s.* a week. His trade union then interfered and insisted that if help was required it must be paid for by the employers. The defendants refused to pay the extra 10*s.* a week, and on May 22, 1914, he discontinued attending at the defendants' works, but continued to be paid compensation equal to half his wages till March 13, 1915. In March, 1915, he was medically examined, and on March 11, 1915, after the medical examination, the defendants' solicitors wrote a letter to his then solicitor saying that "We are advised as a result of the medical examination of your client that he is now quite capable of doing his ordinary work, and we are therefore instructed to inform you that no payments of compensation will be made to him after Saturday in this week, and that if he will present himself on Monday morning at our clients' mill at Bury his place will be open to him." On March 13, 1915, he returned to his work. On May 17, 1915, he enlisted in the Army.

After the outbreak of war, on August 4, 1914, the defendants posted up at their places of business the following notice, dated September 4, 1914: "During the period of the war it has been decided to pay employees who have been called up or volunteered for service with the Regulars, Territorials, &c., full wages, less Government allowances and thrift fund contributions . . . . Re-engagement after the war is over, or when they are able to re-enter the service of the society is guaranteed." In order to make its meaning quite clear a further notice, printed in red, was pasted on it on September 11, 1914, in the following terms: "Henceforward these conditions will apply only to those employees in the service of the society prior to the declaration of war." It was admitted that the notices constituted a contract between the parties under which the employment of the plaintiff was employment at will.

The county court judge gave judgment for the plaintiffs, holding upon the authority of *Elliott* v. *Liggens* (1) that the male plaintiff was continuously in the employment of the defendants from some time before February 7, 1914, until he enlisted on May 17, 1915, and that nothing had been done by either party to terminate the contract of service.

The defendants appealed.

(1) [1902] 2 K. B. 84.

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WARBURTON v. CO-OPERATIVE WHOLESALE SOCIETY, LIMITED.

Gordon Hewart, K.C., and *Eastham*, for the defendants. The decision of the county court judge involves the proposition that although a workman is absent through an injury and is in receipt of compensation under the Workmen's Compensation Act, 1906, and is not under the control or subject to the orders of the person paying the compensation, he is still in the employment of that person even though at the time the recipient may be working for and paid by and under the orders of another employer. That proposition is unsound in law. In order to have the benefit of the contract contained in the notice the employee must be in the service of the defendants at the time he enlists, and he must have been in their employment before the declaration of war, so that there must have been continuous employment from before the declaration of war down to the time he enlists.

Cyril Atkinson, K.C., and *Acton*, for the plaintiffs. Mere temporary incapacity through illness to perform his services does not terminate the employment of a servant or workman: *Elliott* v. *Liggens* (1); *Cuckson* v. *Stones*. (2) There was no evidence that the contract of service was terminated. The letter of March 11, 1915, stated, in effect, that the plaintiff's place was open for him. The male plaintiff enlisted while he was receiving wages, and the onus is upon the defendants to show that the employment has terminated: *Niblett* v. *Midland Ry. Co.* (3) Although the employment was an employment at will, no determination of the will was expressed by either party, and it therefore continued.

Eastham in reply. Although no notice to determine the employment was given by either party, the employment was one at will and could be terminated by either party without notice. There was no continuous employment: *Appleby* v. *Horseley Co.* (4) In the circumstances the employment was terminated by the male plaintiff leaving the defendants' service and receiving the compensation under the Workmen's Compensation Act, 1906. The notice put up in the defendants' premises only applies to those persons who are in the service of the defendants at the time of enlistment. In order that the plaintiff may come within the notice as limited by the addition in red ink there must be continuous employment up to

(1) [1902] 2 K. B. 84.
(2) (1858) 1 E. & E. 248.
(3) (1907) 96 L. T. 462.
(4) [1899] 2 Q. B. 521.

the time of his enlistment, and the notice means actual, not constructive, employment, so that payment of wages is essential.

LUSH J. My mind has fluctuated a great deal during the argument, and I think the case a very difficult one, but I have come to the conclusion that the view taken by the county court judge was right.

The first point for our consideration is what is the meaning of the contract? What is the test by which the question whether a particular person was at the time he enlisted an employee of the defendants ought to be determined? If he was actually being employed and was rendering actual services, there would be no difficulty in answering the question; but supposing a person who had been employed was away from some temporary cause, such as illness or accident, so that it could not be said that he was rendering any actual service at the time, is he a person who can be said to be still an employee who had been called up or had enlisted? In my judgment the contract means that a person in that position is still to be treated as an employee for the purpose of the contract. I think that the original notice means that if a person is in fact in the service of the defendants at the time he enlists or is called up, the employers are to pay him the full wages that he would have received had he been rendering actual service at the time. The qualification contained in the additional notice in red ink (which is not very happily worded) does not mean that a person who years before the declaration of war had been in the service of the employers, but whose relationship to the employers in that capacity had terminated before August 4, 1914, would be within the scope of the contract. It means that any employee who was in the service of the society at the time he enlisted and prior to the declaration of war would be within the scope of the contract; that is to say it limits the class of persons entitled to the benefits under this contract to those who had been continuously in the service of the defendants from before the declaration of war and up to the time that they enlisted. The question is whether on the facts of this case the male plaintiff comes within the contract or not. [Having reviewed the facts, the learned Judge continued:]

With regard to the authorities which have been cited, they are all illustrations of the same principle as that which formed the basis

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Lush J.

of the decision in *Elliott* v. *Liggens* (1), the other cases merely applying that principle to different facts. In *Elliott* v. *Liggens* (1) a workman who had been engaged at a weekly salary had been paid compensation under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), he being temporarily incapacitated from work, and he brought an action in the county court for the wages which he contended he had earned or was entitled to receive during the period of incapacity. The Divisional Court held that he was not entitled to claim the wages, but Lord Alverstone C.J., Darling J., and Channell J. all appear to have treated the plaintiff as a person who was in the service of the employer during the time when he was incapacitated from doing actual work. Indeed, the judgments proceeded upon the basis that the workman had not ceased to be in the service of the employer merely because he was temporarily incapacitated from doing the work which he was employed to do. The same principle is illustrated in *Cuckson* v. *Stones* (2) and *Niblett* v. *Midland Ry. Co.* (3) *Appleby* v. *Horseley Co.* (4) does not assist us, because, although A. L. Smith L.J. held that where the workman had been away from his work and in receipt of compensation for a period of eleven months there had been a break in his employment, in my judgment he so held having regard to the facts of that case, namely, that when the man did come back he returned to perform different work and at a different rate of wages. There was therefore a fresh employment. That decision does not help us or conflict with the view taken by the county court judge upon the facts of the present case.

In my judgment the plaintiff was in the service of the defendants at the time the war broke out and was continuously in their service down to the time when he enlisted in May, 1915. There was evidence to support the finding of the county court judge upon that point, and I am unable to say that upon the facts he did not take the right view. It is true that the plaintiff was not being paid wages, but he was nevertheless in the service of the defendants and was entitled to the benefits conferred by this contract. It was urged upon us that the fact that under the contract no notice was necessary on either side showed that, when the plaintiff ceased to work and was

(1) [1902] 2 K. B. 84.
(2) 1 E. & E. 248.
(3) 96 L. T. 462.
(4) [1899] 2 Q. B. 521.

away owing to the accident, there had been a break in the relationship between them. No doubt under the contract contained in the notices the plaintiff was employed at will, but in my judgment the will had never been exercised to terminate the relationship between the parties. In my judgment, therefore, the appeal must be dismissed.

ROWLATT J. I am of the same opinion. The effect of the contract contained in the notices was to compensate by the continuance of full wages, less Government allowances, &c., an employee who interrupted his employment by enlisting; and the effect of the notice in red ink was that the employment interrupted must have dated back to a period before the war, not necessarily employment in the same grade, but employment under the defendants. The only question is, therefore, whether while the male plaintiff was in receipt of compensation in the circumstances of this case there was evidence that he was in the employment of the defendants within the meaning of the contract. In my judgment the Court must face the question of what would have happened if the plaintiff had enlisted while he was receiving compensation under the Workmen's Compensation Act, 1906. If he was not in the employment of the defendants during that time and therefore would not have been entitled to the benefits of the contract if he had enlisted during that time, I do not think his claim is strengthened by the fact that he was again in receipt of wages before he enlisted, because that state of things had not existed continuously from a time before the war. In my judgment there was ample evidence upon which the county court judge could find that he was, even while he was drawing his compensation, in the employment of the defendants within the meaning of the contract, although his duties and wages were suspended. That position he abandoned by entering military service, and in my judgment within the fair construction of the contract he is entitled to the benefits conferred by it.

Appeal dismissed.

Solicitors for plaintiffs: *Torr & Co., for C. B. Hudson, Rochdale.*

Solicitors for defendants: *Davenport, Cunliffe & Blake, for Tatham, Worthington & Co., Manchester.*

J. E. A.

1916
Jan. 22;
Feb. 1.

LEISTON GAS COMPANY *v.* LEISTON-CUM-SIZEWELL URBAN DISTRICT COUNCIL.

[1915 L. 1916.]

Contract—Impossibility of Performance—Supervening Illegality—Supply of Gas for Street Lamps—Order restraining Lighting—Defence of Realm Acts.

A gas company agreed for five years with a local authority, for the purpose of lighting the streets within their district, to furnish certain street lamps and connect them with the gas mains and to supply gas and to light, extinguish, and maintain the lamps. The local authority agreed to pay an annual sum per lamp, payments to be made in four equal quarterly instalments. While the contract was running, the gas company having so far performed their part of the contract, an Order was made under the Defence of the Realm Acts prohibiting until further order the lighting of the street lamps. The gas company claimed three quarters' instalments from the date of the Order:—

Held, that inasmuch as the Order, having been made on an emergency, did not render the lighting absolutely and completely unlawful or the further performance of the contract once for all impossible, the local authority were not excused from payment.

TRIAL of action before Low J. under Order XIV., r. 8, of the Rules of the Supreme Court, 1883.

The plaintiffs claimed three quarterly payments said to be due on March 31, June 30, and September 30, 1915, under an agreement between them and the defendants dated June 2, 1911, for the public lighting of Leiston-cum-Sizewell in the county of Suffolk. The agreement was to continue for five years from August 1, 1911, until determined by six calendar months' notice on either side expiring on July 31, 1916, or on July 31 in any subsequent year. The plaintiffs undertook to provide 105 columns lanterns and inverted incandescent burners complete with automatic lighters and to connect the same with their mains by August 1, 1911. The whole of the plant was to remain the property of the plaintiffs. During the continuance of the agreement the plaintiffs were to supply gas, to light, extinguish, clean, repair, paint, and maintain the lamps, and to provide incandescent mantles and chimneys as required. One hundred and one lamps were to be lit half an hour

after sunset and extinguished at 11.15 P.M. Four lamps were to be lit half an hour after sunset and extinguished half an hour before sunrise. Exception was to be made in the case of bright moonlight nights, but the plaintiffs undertook to light the lamps as usual when the moon should be obscured. In case of dispute the number of bright moonlight nights in the year was to be reckoned as one-seventh of the total. The plaintiffs were to provide by means of incandescent burners an effective candle power of not less than sixty sperm candles per single burner lamp. The defendants were to pay to the plaintiffs the sum of 1*l.* 17*s.* 6*d.* per lamp per annum for each of the 101 lamps mentioned above and 3*l.* 7*s.* 6*d.* per lamp per annum for each of the four lamps mentioned above. Payments were to be made in four equal quarterly instalments of 50*l.* 14*s.* 4*d.* If the plaintiffs failed to light any lamps they were, unless the failure was due to circumstances beyond their control, or unless the payments to be made by the defendants were in arrear, to forfeit to the defendants sixpence per lamp for every night on which any lamp was not lighted. The plaintiffs were to affix to each lamp and maintain thereon a distinctive number and put a plain red glass into the outward side of the last lamp on each of the outgoing roads. Disputes or differences as to the meaning or effect of the agreement were to be referred to arbitration.

The plaintiffs provided the lanterns and burners and connected them with their mains and performed their part of the contract in all respects up to December 31, 1914.

Under powers contained in regulations 11 and 12 of the Defence of the Realm (Consolidation) Regulations, 1914 (1), made under

(1) Defence of the Realm (Consolidation) Regulations, 1914:—

"11. The Secretary of State or any person authorised by him may by order direct that all or any lights, or lights of any class or description, shall be extinguished or obscured in such manner and between such hours as the order directs, within any area specified in the order and during such period as may be so specified, and if the person having control of the light fails to comply with the order, he shall be guilty of an offence against these regulations . . . .

"12. The competent naval or military authority may by order direct that all or any lights, other than lights not visible from the outside of any house, shall be kept extinguished or obscured between such hours and within such area as may be specified in the order; and

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LEISTON GAS COMPANY v. LEISTON-CUM-SIZEWELL URBAN COUNCIL.

the Defence of the Realm Act, 1914, an Order was made on September 30, 1914, reducing the number of lights in public places. As a result of this Order the defendants reduced the number of street lamps to twenty-six from January 1 to January 23, 1915. On that date an Order was made containing the following clauses:—

"1. The public lighting shall be reduced to the minimum consistent with safety. All powerful lamps shall be extinguished, lowered, or obscured, and all lamps shall be shaded so as to cut off the light from the direction of the sky . . . ."

"4. All public and private lights visible from the direction of the sea shall be kept extinguished or effectively obscured from one hour after sunset each night.

"5. Upon being informed by the senior police officer that there is danger of an attack from the sea or by hostile aircraft, all lights shall be immediately extinguished and electric light and gas companies shall take such steps as will ensure this being rapidly done."

As a result of this Order the defendants extinguished all their street lamps from January 23 onwards.

The plaintiffs claimed payments for the three quarters above mentioned.

J. B. Matthews, K.C., and *Rayner Goddard*, for the plaintiffs.

Hawke, K.C., and *A. H. Poyser*, for the defendants. The whole object and purpose of this contract is the lighting of the street lamps. This has now become illegal and therefore impossible: *Esposito* v. *Bowden* (1); *Baily* v. *De Crespigny* (2); *Geipel* v.

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if any person resident within that area fails to comply with the order he shall be guilty of an offence against these regulations."

"56. A person alleged to be guilty of an offence against these regulations may be tried either by court-martial or before a Court of summary jurisdiction: . . . .

"57. A person found guilty of an offence against these regulations by a court-martial shall be liable to be sentenced to penal servitude for life or any less punishment . . . .

"58. A person convicted of an offence against these regulations by a Court of summary jurisdiction shall be liable to be sentenced to imprisonment with or without hard labour for a term not exceeding six months, or to a fine not exceeding 100*l.*, or to both such imprisonment and fine . . . ."

(1) (1857) 7 E. & B. 763.

(2) (1869) L. R. 4 Q. B. 180.

Smith. (1) Consequently the parties are absolved from further performance: *Krell* v. *Henry* (2); *In re Shipton, Anderson & Co. and Harrison Brothers & Co.* (3); *St. Enoch Shipping Co.* v. *Phosphate Mining Co.* (4) The plaintiffs are not entitled to payment until they supply the gas. Therefore the case of *Chandler* v. *Webster* (5), where the price was payable and had been paid before the happening of the event which was the basis of the contract, does not apply.

Matthews, K.C., in reply.

Cur. adv. vult.

Feb. 1. Low J. delivered a written judgment which, after stating the facts, proceeded as follows: It has been contended on behalf of the defendants that immediately the Order was made forbidding the lighting of the lamps the agreement came to an end, and the plaintiffs were entitled to remove and dispose of the lamps and other plant, and the defendants were absolved from making any further payments. In support of this proposition the defendants relied on *Esposito* v. *Bowden* (6), *Baily* v. *De Crespigny* (7), *Krell* v. *Henry* (2), *Geipel* v. *Smith* (1), and the authorities cited in those cases.

I have to consider first what the contract is, and it appears to me that it is not only a contract to furnish light, but also a contract to furnish for a given period the necessary plant, and it is quite impossible to distinguish in the amount agreed to be paid per lamp how much is deferred payment spread over the period for furnishing the plant and how much is for the actual gas consumed; and, although it is not material, a very little knowledge of these matters shows that in a five years' contract the former is probably a not inconsiderable proportion of the charge per lamp, which is 1*l.* 17*s.* 6*d.* per annum.

Next I have to consider whether the provision of plant and supply of gas in the defendants' district has become unlawful within the meaning of the cases cited. I do not think that it is correct to say that because in time of emergency power is given for a competent authority to suspend the actual lighting in a given area for such times as may be considered necessary for national safety and because

(1) (1872) L. R. 7 Q. B. 404.
(2) [1903] 2 K. B. 740.
(3) [1915] 3 K. B. 676.
(4) [1915] W. N. 197.
(5) [1904] 1 K. B. 493.
(6) 7 E. & B. 763.
(7) L. R. 4 Q. B. 180.

1916

LEISTON GAS COMPANY v. LEISTON-CUM-SIZEWELL URBAN COUNCIL.

LOW J.

such power is exercised a provision for lighting within that area becomes unlawful within the meaning of these authorities. Nor do I think that it renders it impossible within the meaning of the authorities referred to. What the Court in those cases considered was a state of things which rendered the carrying out of the contract absolutely and completely unlawful or once for all impossible. In the present case it is impossible from day to day or from week to week to tell whether it may be necessary to stop all or some only of the lights or whether it will be possible to resume lighting altogether, and, in my view, the plaintiffs must be ready on the repeal or relaxation of the restriction to go on providing the light and must keep the whole of the apparatus in working order ready for the purpose, and it does not appear to me to be material that the restriction which might possibly have been a very short one has turned out to be one of considerable length. I am also of opinion that this contract is an executed contract in the sense which I have stated above, and that it is impossible to divide the charge per lamp and say so much only is due for plant and so much for gas actually burnt.

I therefore come to the conclusion that through the exercise by the authorities of their powers under the Defence of the Realm Acts the performance of this contract has not been rendered either unlawful or impossible within the meaning of the cases to which reference has been made. [The learned judge then referred to an attempt made by the plaintiffs to come to terms and, after expressing his regret that the defendants had not accepted the suggestion, continued :]

With reference to the defendants' contention that I should treat the contract as suspended during the time the Orders under the Defence of the Realm Acts are in force, I can see no ground which would entitle me to take such a course. I think my reasons for this will appear from the earlier part of this judgment.

My judgment therefore is for the plaintiffs for the amount claimed with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs : *Mackrell, Maton & Co.*

Solicitor for defendants : *Frank Graham, for Harold A. Mullens, Leiston.*

W. H. G.

THOMPSON, APPELLANT *v.* DAVISON, RESPONDENT.

1916
April 6.

Licensed Premises—Sale or Supply of Intoxicating Liquor—Gratuitous Supply to Friend of Licensee—Offence—Defence of the Realm (Liquor Control) Regulations, 1915—Central Control Board (Liquor Traffic) Order, July 30, 1915.

The Defence of the Realm (Liquor Control) Regulations, 1915, made in pursuance of the Defence of the Realm (Amendment) (No. 3) Act, 1915, provide that the Central Control Board (Liquor Traffic) may "for the purposes of the control of the sale and supply of any intoxicating liquor" regulate the hours of closing of any licensed premises or club, and by regulation 27, "for the purpose of these Regulations the expression 'supply' in relation to intoxicating liquor means supply otherwise than by way of sale."

By an Order made under the Regulations on July 30, 1915, it was provided (inter alia) that after 9 P.M. on weekdays no person should "sell or supply to any person in any licensed premises or club any intoxicating liquor to be consumed on the premises, or permit any person to consume in any such premises or club any intoxicating liquor" except in the case of a person residing in the licensed premises or club.

At 11 P.M. on a weekday the respondent, the licensee of a public-house, supplied whisky in the public-house gratuitously to a man who was a personal friend of the respondent, and who consumed the whisky in the house :—

Held, that the Order applied to a case where a licensee was entertaining his personal friends, and that the respondent had acted in contravention of the Order.

Blakey v. *Harrison* [1915] 3 K. B. 258 distinguished.

CASE stated by justices for the county of Durham.

Informations were preferred against the respondent, Mary Ellen Davison, an innkeeper, for that she on October 30, 1915, at Trimdon in the county of Durham, being then duly licensed to sell by retail intoxicating liquors in her house and premises there situate, (1.) did supply at 11.15 P.M. whisky to one Hughes in her licensed premises to be consumed on the premises, and (2.) did permit intoxicating liquor to be consumed on her licensed premises at 11.15 P.M., contrary to an Order dated July 30, 1915, made by the Central Control Board (Liquor Traffic) for the area of the North-East Coast under the Defence of the Realm (Liquor Control) Regulations, 1915, duly made in pursuance of the Defence of the Realm (Amendment)

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(No. 3) Act, 1915. The justices dismissed both informations subject to this case.

At the request of the parties the two informations were heard together, being founded on the same facts, and the following facts were proved or admitted :—

By an Order in Council duly made in pursuance of the Defence of the Realm (Amendment) (No. 3) Act, 1915, intituled the Defence of the Realm (Liquor Control) Regulations, 1915, it was ordered (inter alia) :

" (2.) For the purposes of the control of the sale and supply of any intoxicating liquor in any area the Board may by order—(*a*) Direct that any licensed premises or club in the area in which intoxicating liquor is sold by retail or supplied shall be closed either for all purposes or for the purpose of such sale or supply ; (*b*) Regulate the hours during which any such premises or clubs are to be or may be kept open, distinguishing, where it is so determined, the hours during which the premises are to be or may be kept open for such sale or supply as aforesaid, and the hours during which they are to be or may be kept open for other purposes ; and any such order shall have effect notwithstanding anything in the law relating to licensing or the sale of intoxicating liquor."

" (24.) It shall be the duty of the police to enforce these Regulations and any orders of the Board made thereunder."

" (27.) For the purposes of these Regulations—The expression ' supply ' in relation to intoxicating liquor means supply otherwise than by way of sale."

On July 30, 1915, in pursuance of the powers conferred upon them by the said Regulations, an Order was made by the Central Control Board (Liquor Traffic) for the area of the North-East Coast which ordered (inter alia) as follows :—

" LIMITS OF AREA.

" (1.) The area to which this Order applies is . . . . the area comprising (inter alia) the petty sessional division of Castle Eden.

" HOURS DURING WHICH INTOXICATING LIQUOR MAY BE SOLD.

" (A) *For Consumption on the Premises.*

" 2.—(1.) The hours during which intoxicating liquor may be sold or supplied in any licensed premises or club for consumption

on the premises shall be restricted, and shall be as follows:—On weekdays—The hours between 12 noon and 2.30 P.M. and between 6 P.M. and 9 P.M. Except between the aforesaid hours no person shall (*a*) Either by himself or by any servant or agent sell or supply to any person in any licensed premises or club any intoxicating liquor to be consumed on the premises; or (*b*) Consume in any such premises or club any intoxicating liquor; or (*c*) Permit any person to consume in any such premises or club any intoxicating liquor.

"SAVING PROVISIONS.

"(6.) Nothing in the foregoing provisions of this Order shall be deemed to prohibit, in cases where the same is otherwise lawful, (*a*) The consumption of intoxicating liquor by any person in any licensed premises or club where he is residing.

"EXPLANATORY PROVISIONS.

"10. (*a*) Nothing in this Order authorises any licensed premises to be kept open for the sale of intoxicating liquor except during the hours now permitted by law.

"(*b*) The prohibition under this Order of the sale supply and consumption of intoxicating liquor except during certain hours is not subject to the exceptions provided for in the Licensing Acts with respect to bona fide travellers and the supply of intoxicating liquor at railway stations or any other provisions in those Acts enabling intoxicating liquor to be supplied during closing hours in special cases.

"(*c*) The expression 'licensed premises' includes any premises or place where the sale of intoxicating liquor is carried on under a licence."

On Saturday, October 30, 1915, police officers visited the Locomotive Inn, Trimdon Colliery, of which the respondent was the licensee, at 11.15 P.M., and the premises were then closed according to law. The constables entered the kitchen by the back door, which was closed but not locked, and found the respondent, her husband, and two men there. The three men were at a table with glasses containing whisky. One of the officers asked the respondent if she was aware that she was contravening the Order, and she replied, "It is the first time Hughes has been in so late." After leaving the house the constables looked through the window and saw the men consume the contents of their respective glasses.

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The house had been closed to the public at 9 P.M. The two men were on the premises at the invitation of the respondent, and the respondent gave to each a glass of whisky. There was no sale. The respondent admitted that she had received the Order of the Central Control Board, that her house was situate within the area defined by the Order, and that the kitchen where the alleged offence was committed was part of the licensed premises.

On the part of the prosecution it was contended that the respondent, having admitted the supply and consumption of intoxicants by the two men during the hours prohibited by the Order, had committed an offence against paragraph 2 of the Order, and that the making of the Order under the Defence of the Realm (Liquor Control) Regulations, 1915, prohibiting the sale or consumption of intoxicants, except between certain hours, subject to the exception mentioned above, amounted to an absolute prohibition against the supply or consumption of such liquor on licensed premises under any circumstances outside those hours, and that the facts that the premises were closed to the public and the licensee was bona fide entertaining her friends at her own expense were immaterial.

On the part of the respondent it was contended that the supply to a bona fide friend during such time as the premises were being used as an ordinary dwelling-house did not constitute an offence against the Order, and that the supply and consumption prohibited by the Order referred to the supply or consumption of intoxicating liquor sold.

The attention of the justices was called to the case of *Blakey* v. *Harrison*. (1) The justices were of opinion on the first information that the definition in the Defence of the Realm (Liquor Control) Regulations, 1915, of the word "supply" as meaning "supply otherwise than by way of sale" was intended to apply to the distribution of intoxicants in clubs, and that accordingly the words "may be sold or supplied in any licensed premises or club" were intended to prohibit the sale on licensed premises and the supply or distribution amongst members in a club, and that in so far as licensed premises were affected by these particular words the "supply" prohibited by the Order was the supply of liquor sold. Further, the word "supply" could not on a reasonable construction

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be held applicable where the premises were closed to the public and were being used as a private residence by the licensee. In forming these opinions the justices took into consideration the words at the commencement of paragraph 2 of the Order, " Hours during which intoxicating liquors may be sold."

With regard to the second information the justices were of opinion that the words " permit any person to consume in any such premises or club any intoxicating liquor " were solely intended to prohibit persons, resorting to licensed premises or clubs, bringing on to such premises intoxicating liquors during prohibited hours for the purpose of consuming such intoxicants there, and to make it a penal offence to permit any such person to do so.

The question on which the opinion of the Court was desired was whether the justices upon the above statement of facts came to a correct determination and decision in point of law.

Simey, for the appellant. Unless the word " supply " in these Regulations and this Order is to be limited to the supply of liquor in clubs, the facts show that there was no defence to the first information. There is no reason for giving that restricted interpretation to the word. By regulation 27, supply is defined to mean supply otherwise than by sale. The Act in question in *Blakey* v. *Harrison* (1) did not contain that definition, and did use the word " supply " solely with reference to clubs, and that case is, therefore, no authority in the present case. This Order uses the word in many instances in a sense which obviously cannot apply to clubs.

With regard to the second information, there is no ground for giving to the Order the very forced and artificial construction which the justices have placed upon it : *Williams* v. *Pearce*. (2)

Cecil Whiteley, for the respondent. It is not contended that supply in this Order is confined to clubs, but both supply and consumption have a different meaning when used in connection with licensed premises from that which they have in the case of a club. In the former case supply means the supply of liquor which has been sold to some person, but not necessarily the person to whom it is supplied : *Williams* v. *Pearce*. (2) It is true that this construction gives to the word " supply " two different meanings in the

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same regulation, but a similar result followed from the decision in *Blakey* v. *Harrison* (1), where it was held that the word " consumption " when applied to licensed premises did not include the consumption of liquor gratuitously supplied by the licensee to his friends.

It has never been an offence, either under the Licensing Acts or at common law, for a licensee to supply liquor after the hours of closing to private friends bona fide entertained by him at his own expense. If it had been intended by this Order to make that an offence which has hitherto never been one the Order would have contained clear words to that effect. It is true that clause 10 (*b*) of this Order removes the exceptions contained in the Licensing Acts with respect to bona fide travellers and the supply of liquor at railway stations, but the words " any other provisions in those Acts enabling intoxicating liquor to be supplied during closing hours in special cases " do not apply to the case of a licensee supplying liquor after closing hours to his private friends at his own expense, for there is no provision in any of the Licensing Acts " enabling " a licensee to do that which he was never prohibited from doing. Sect. 61, sub-s. 1 (*a*), of the Licensing (Consolidation) Act, 1910, which refers to this matter, is not an enabling section, but is merely declaratory of what has always been the law. Therefore, although the justices may have given erroneous reasons for their decision, both informations were rightly dismissed.

RIDLEY J. The question in this case arises under an Order of the Central Control Board (Liquor Traffic) dealing with the prohibition of the sale or supply of intoxicating liquor during certain hours; which was made after the decision by this Court of the case of *Blakey* v. *Harrison*. (1) Proceedings were taken against the respondent, who was the licensee of a public-house, under clause 2 of the Order, for supplying whisky to one Hughes in the licensed premises after 9 P.M. and for permitting the consumption of the whisky by Hughes. The whisky had not been bought by Hughes, but had been supplied to him gratuitously by the respondent. The justices dismissed both informations on the grounds which are set out in the case.

(1) [1915] 3 K. B. 258.

In my opinion, if one has regard only to the language of clause 2 of this Order, it is clear on the facts of this case that there was a supply of liquor by the respondent within the meaning of that clause; but if one refers to regulation 27 of the Regulations under which this Order was made, which expressly provides that "the expression 'supply' in relation to intoxicating liquor means supply otherwise than by way of sale," it becomes still more plain that there was such a supply. The respondent relied on the decision in *Blakey* v. *Harrison* (1), to which I was a party; but that case was decided on s. 1 of the Intoxicating Liquor (Temporary Restriction) Act, 1914, and an order of justices made thereunder, and the language, both of the section and of the order, was different from the language used in these Regulations and this Order. The words used in that case with regard to licensed premises were "sale or consumption"; the words "supply or consumption" were confined to clubs. Further, the exemption was of a much more limited character, namely, in the case of bona fide residents in hotels and clubs, whereas clause 6 of this Order provides that the prohibition shall not apply to the consumption of intoxicating liquor by any person in any licensed premises or club where he is residing. The Court in *Blakey* v. *Harrison* (1) came to the conclusion that the juxtaposition, in the case of licensed premises, of the two words "sale or consumption," and the limited character of the exemption, indicated that the Order was only intended to prohibit the consumption of liquor which had been purchased, and that there was nothing to show that the framers of the Order had intended to include the consumption of liquor by bona fide guests of the licensee. In the present case we find, as I have said, very different language, and regulation 27 seems to me expressly to meet the argument which was successfully urged in *Blakey* v. *Harrison*. (1) The justices seem to have been impressed with the extraordinary consequences which it is said would follow if the respondent were liable to be convicted, but where the language of the Order is perfectly plain, as it is in this case, we cannot have regard to any such considerations as that. There is no ground whatever for confining the word "supply" in this Order, as the justices thought, to the supply of liquor in clubs.

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Ridley J.

Mr. Whiteley, for the respondent, contended that the word "supply" in clause 2 has one meaning in the case of licensed premises and another in the case of clubs. I know of no authority for giving a distributive meaning to the word "supply" in this Order, and I do not find anything in the language of clause 10 (*b*) to support this contention. The object of that clause appears to have been to make it clear that the prohibition under the Order was not to be subject to the provisions contained in the Licensing Acts by which certain privileges were given to bona fide travellers, railway stations, and in certain other special cases.

With regard to the second information, the charge was that the respondent permitted the consumption of whisky during prohibited hours. The justices were of opinion that clause 2 (1.) (*c*) of the Order only applied to cases where persons brought liquor into licensed premises or clubs for consumption during prohibited hours. It has not been contended before us that that construction of the Order can be maintained, and there is nothing in the language of the Order to justify it.

The appeal will therefore be allowed, and the case must be remitted to the justices with a direction to them to convict on both informations.

BRAY J. I am of the same opinion. The justices have given their reasons why they thought this case did not come within clause 2 of the Order of July 30, 1915. They were of opinion that the words of the heading to clause 2, "Hours during which intoxicating liquor may be sold," showed that in the case of licensed premises the Order only applied to liquor which had been sold, and that supply only applied to the case of clubs. It has not been contended in this Court that those reasons were well founded, and I only refer to them for the purpose of pointing out that the heading to clause 2 is somewhat misleading, and that the justices' view involves giving to the word "supply" a meaning which is not the natural one. If it had been intended to confine the word "supply" to clubs, the Order would have said so, and we have no right to depart from the ordinary and natural meaning of the word.

It has been contended before us that the word "supply," as regards licensed premises, must be construed as meaning a supply

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Bray J.

after a sale, though not necessarily a sale to the person supplied—in other words, that clause 2 of this Order does not apply to a case where the licensee supplies liquor gratuitously to his friends. The difficulty in the way of adopting this construction is that the word cannot be construed in that way in the case of clubs, and therefore the argument involves giving two different constructions to the same word in the same clause of the Order, and it also necessitates construing the word in other than its natural meaning. No sufficient reason has been given to us why the word "supply" in clause 2 of the Order should not be construed in its ordinary and natural meaning, and if it is construed in that way, as it ought to be, it is clear that the respondent did supply intoxicating liquor in the licensed premises during prohibited hours, and was therefore guilty of an offence under clause 2 (1.) (*a*).

Then, with regard to the second information, if the word "consume" in paragraph 1 (*c*) of clause 2 is given its natural meaning, the respondent undoubtedly did permit Hughes to consume the whisky; so counsel was driven to say that consume means consume liquor which has been sold, and he relied on the decision of this Court in *Blakey* v. *Harrison*. (1) But the language of the Order in that case was entirely different from the language of this Order, and, bearing in mind that this Order was made after the date of the decision in *Blakey* v. *Harrison* (1), it is quite possible that the draftsman of the Order had that case in mind when framing this Order; but, however that may be, it is to my mind most misleading to try and construe an Order containing one set of words by reference to a decision on another Order containing different words. My brother Ridley has explained why the Court felt obliged to decide *Blakey* v. *Harrison* (1) in the way they did, and I have nothing to add to what he said upon that point.

AVORY J. I agree. The only reason which has been suggested for not giving to the word "supply" and the word "consume" in clause 2 of this Order their ordinary and natural meaning is that this Court did in *Blakey* v. *Harrison* (1) hold that the words "sale or consumption" in a different Order must receive a limited construction. That case was decided on June 17, 1915. The Order which we

(1) [1915] 3 K. B. 258.

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AVORY J.

have to construe was made on July 30, 1915, and having regard to clause 6 of the Order, which provides that "nothing in the foregoing provisions of this Order shall be deemed to prohibit, in cases where the same is otherwise lawful, (*a*) The consumption of intoxicating liquor by any person in any licensed premises or club where he is residing," it is obvious to my mind that that clause was framed in that way in order to meet the difficulty which had arisen in *Blakey* v. *Harrison* (1), where the exemption was limited to residents in hotels. A further reason for not construing clause 2 of this Order in an unnatural sense is that in a subsequent case, *Williams* v. *Pearce* (2), this Court laid it down in distinct terms that the words "sell or supply" in another Order made by the Central Control Board were used to cover the distribution of liquor by a licence-holder both by way of sale and otherwise.

With regard to the point raised under clause 10 (*b*), notwithstanding Mr. Whiteley's argument I am of opinion that the exceptions provided for in the Licensing Acts referred to in that clause, to which the Order is not to be subject, include the case of a licensee supplying liquor after the hours of closing to his friends at his own expense, which is dealt with in s. 61, sub-s. 1 (*a*), of the Licensing (Consolidation) Act, 1910. It is said that that is not a provision "enabling intoxicating liquor to be supplied during closing hours," because before the passing of the Act of 1910 it had been established by a decision at common law that a licensee was entitled to entertain his private friends after closing hours (3), but I think that if a principle of the common law is embodied in a section of a statute it may be fairly described as an enabling provision. I am quite satisfied that the draftsman of the Order intended to include that case in the matters dealt with in clause 10 (*b*).

Appeal allowed.

Solicitors for appellant: *Rider, Heaton, Meredith & Mills, for W. Watts Moses, Sunderland.*

Solicitors for respondent: *Godden, Holme & Ward, for A. Geipel, West Hartlepool.*

(1) [1915] 3 K. B. 258. (2) [1916] W. N. 65.
(3) See *Overton* v. *Hunter* (1859) 1 L. T. 366.

F. O. R.

[IN THE COURT OF APPEAL.]

READ *v.* BAKER.

C. A.
1916
March 22, 27.

Employer and Workman—Compensation—Solicitor's Clerk—Cycling from Court to Office—Fatal Accident—Arising "out of" his Employment —Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

The deceased, a solicitor's clerk, used to attend on his employer's business at a Court held once a week by local justices to whom the employer was clerk. The Court was ten miles from the solicitor's office, and sometimes the deceased travelled to and fro by train, his fare in that case being paid by his employer, and at other times, to the knowledge and without the disapproval of his employer, he rode there and back on his bicycle. On the day of his death he was returning from the Court to the office on his bicycle when a motor lorry collided with it and he was killed :—

Held, that in the circumstances the use of the bicycle was not attended by any special risk, and that the accident to the deceased did not arise "out of the employment."

Appeal from an award of the judge of the Rochester County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was a widow and the mother and sole dependant of the deceased, who was employed as a clerk to the respondent Baker, a solicitor at Rochester. The respondent was clerk to the justices at Northfleet, ten miles from Rochester. The justices met once a week at Northfleet, and the deceased used to attend the Court on his employer's business and then return to the office at Rochester. He generally went by train, and his train fares were office expenses paid by the respondent, but sometimes he went on his bicycle to the knowledge and without the disapproval of the respondent, who also at times went to and fro on his bicycle. The road from Rochester to Northfleet is a main road with no peculiar risk. On June 17, 1915, the deceased had completed his work at the Northfleet Court-house and was returning to Rochester on his bicycle when a motor lorry collided with it and he was killed. His death was therefore an accident arising in the course of his employment, and the question for decision was whether it also arose out of his employment. The county court judge found that the peril encountered was a special

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risk of the employment and held that the accident arose out of the employment, and made an award in the applicant's favour.

The respondent appealed.

W. Shakespeare, for the appellant. The learned county court judge misdirected himself in this case. The whole decision is contrary to the law as laid down by the House of Lords and clearly stated by Lord Dunedin in *Plumb* v. *Cobden Flour Mills Co.* (1) The deceased was not exposed to a greater risk than a member of the general public and the applicant was not entitled to recover compensation: *Slade* v. *Taylor*. (2) The appeal should be allowed.

C. M. Pitman, for the applicant. The suggested misdirection of the learned judge was really a summary of the arguments put forward at the hearing on behalf of the applicant. The question of special risk is a question of fact to be found by the county court judge: *Clayton* v. *Hardwick Colliery Co.* (3) He has found that there were circumstances in this case exposing the deceased to special risk, and the Court will not interfere with that finding. The present case is covered by the decision in *Pierce* v. *Provident Clothing and Supply Co.* (4) rather than by that in *Slade* v. *Taylor*. (2)

Shakespeare in reply.

Cur. adv. vult.

March 27. LORD COZENS-HARDY M.R. This appeal raises the familiar question whether an accident, which proved fatal, arose "out of the employment" of the deceased man. He was clerk to the respondent, a solicitor at Rochester. The solicitor is clerk to the justices at Northfleet, a place ten miles distant from Rochester. The justices sit once a week at Northfleet. The deceased attended the Court on his master's business and then returned to the office at Rochester. He generally went by train. His train fares were office expenses, and as such were paid by his master. Sometimes he went on his bicycle to the knowledge of his master and without his disapproval. On June 17, a summer day, the deceased preferred a bicycle ride to a journey by train, and the master did the same. On his way back to Rochester, soon after 12, a motor lorry collided with his bicycle and he was

(1) [1914] A. C. 62, 68—69.
(2) (1915) 8 B. W. C. C. 65.
(3) (1915) 9 B. W. C. C. 136.
(4) [1911] 1 K. B. 997.

killed. The county court judge held that the accident arose out of the employment. In my opinion the award cannot stand.

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It is sufficient for the purpose of this appeal to point out that there was no direction by the employer to the deceased to use his own bicycle rather than the public conveyance by train, and that the road from Rochester to Northfleet is a main road with no peculiar risk. There is no ground for the suggestion that a bicycle is such a dangerous article that its permitted occasional user makes the employer liable for the consequences of an accident on the road. The facts being admitted or not disputed, it becomes a question of law whether the accident arose out of the employment. In my opinion it did not. The learned county court judge misdirected himself as to the law.

To avoid future misapprehension I desire to say that it must not be assumed that in my opinion the result would not have been the same if the master had directed the deceased to use his bicycle on that particular day. The present case bears no resemblance to *Pierce* v. *Provident Clothing and Supply Co.* (1), upon which reliance was placed.

The appeal must be allowed with costs.

PHILLIMORE L.J. The applicant is the mother and the dependant of a solicitor's clerk who was killed on June 17 last by a collision between a motor van and his bicycle which he was riding from Northfleet to Rochester. His employer is a solicitor and clerk to the local justices, having his office at Rochester. The justices sit at Northfleet one day every week, and it was part of the business of the deceased to attend that Court from time to time, returning to his employer's office at Rochester. He sometimes went by train, in which case his employer paid the fare. Sometimes, the trains being not convenient, he went to and fro on his own bicycle, with the knowledge of his employer, who did not disapprove, and who himself used a bicycle sometimes.

On the occasion of his death he had just completed work at the Northfleet Court-house and was returning in the course of his duty to the office at Rochester. His death was therefore an accident in the course of his employment. But the question is whether it arose out of his employment.

(1) [1911] 1 K. B. 997.

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Now this Court has held frequently that street or road accidents, such as may befall any dweller in the United Kingdom who goes about on business or pleasure in the ordinary way, are not accidents which arise out of a man's employment. They are common accidents of mankind. The only exception is where a man's employment was such as to expose him to a larger danger from street risks than that which is incurred by ordinary men : see *Pierce* v. *Provident Clothing and Supply Co.* (1) The first case in which I had to take part was *Slade* v. *Taylor*. (2) I found the doctrine firmly established and loyally followed it, with the reservation that I passed no independent opinion upon it. Quite recently—on the 16th inst.—in *Dennis* v. *A. J. White & Co.* (3) the majority of the Court applied it again. This being so, it would appear reasonably plain that the melancholy accident in this case cannot be said to have arisen out of the deceased's employment. But the county court judge held that it did so arise, and it has been contended before us that this decision is a decision upon a question of fact, from which there is no appeal. To a certain degree the decision is and must be one upon a question of fact.

In the application of the canon of construction matters varying in each case may have to be taken into consideration, and it may be a question of degree as to how far the nature of the employment exposed the man employed to a more than ordinary amount of danger from the streets. But there must be something to start with, an inferior limit. And it does not seem possible upon the authorities to hold that the inferior limit had been reached in this case. All that the man had to do was to get to and from Northfleet to Rochester once a week, and he had a choice of routes and vehicles. It might, therefore, properly be put that there was no evidence upon which the judge could found such a decision as he gave, treating it as a decision upon a question of fact.

There is another reason for holding his judgment open to attack. No tribunal of fact is sovereign, unless it is properly instructed as to the law. There are passages in the learned judge's judgment which, if they embody his view of the law, cannot be supported. It was said in support of his judgment that in these passages he

(1) [1911] 1 K. B. 997. (2) 8 B. W. C. C. 65.
(3) (1916) 63 Sol. Jo. 385.

was not stating his own opinion, but the argument of counsel for the applicant. No doubt he did start with stating the arguments for the applicant's claim, but insensibly as he went on he merged that statement of the arguments of counsel into a statement of his own reasons. And it seems to me that at least when he reached the passage "The cases are so dissimilar that no reasoning applicable to the one can be relevant to the other" he began to state his own conclusions. Once later, it is true, he stops to criticize and reject a particular argument, whether on the supposition that it is put before him by counsel or that he is putting it before himself. Otherwise, as I have said, I think that he is stating his own reasoning, and that this reasoning does not accord with the rule of law as laid down by the decisions.

Of the two questions which he puts as, I think, his own questions, the first is certainly too broadly stated. "Does the workman's employment impose on him the duty of facing the particular peril?" Any employee sent on any errand may be said to face certain dangers of the road; even as a pedestrian, he may slip upon a banana skin. Again later he seems to take the view that, there being conflicting principles laid down by the English and Scotch Courts, he may cut the knot by giving the go-by to the law and deciding any case that comes before him as a question of fact. This seems to mean deciding according to his general impression of the rights of the case, without regard to any decisions which would guide his judgment.

I think, therefore, that we are not concluded by the learned judge's finding, and that we may decide this case according to the principles which, whether or not they depend upon a correct construction of the Act of Parliament, are certainly binding upon this Court until it is corrected by higher authority.

I agree that the appeal should be allowed.

SARGANT J. In this case it is clear that the accident arose in the course of the employment, and the only doubt is whether it also arose out of the employment.

As regards this point, whatever objection may be taken to the learned county court judge's statement of the law in the course of his judgment, it seems to me that he undoubtedly concludes with

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an express, or at any rate most clearly implied, finding of fact that there was an element of special risk or peril in making the journey of ten miles from Northfleet to Rochester on a bicycle. A question of fact is one for the county court judge, quite apart from the consideration that he has necessarily a far closer acquaintance with the roads in the locality and the nature of the traffic there than this Court can possess. And had this journey on a bicycle from Northfleet to Rochester been necessarily involved in the deceased's employment either by virtue of there being no other available means of transit or by virtue of a direct command by the employer, then I should have concluded that the case of *Clayton* v. *Hardwick Colliery Co.* (1) was applicable and that this Court could not have interfered with the award that has been made.

But here I cannot find that there was involved in or arose out of the employment any duty more definite or precise than that of making a journey or succession of journeys between Rochester and Northfleet. The learned county court judge has not found —and indeed there was no evidence on which he could find—that the mere making of such a journey or journeys, irrespective of the particular mode of transit, did in itself involve any special or particular risk. The deceased was at liberty to use the train for this purpose at his employer's expense, and often did so. The special risk which he is found by the learned county court judge to have incurred was in my judgment one arising not out of the deceased's employment, but from his preferring to return by bicycle instead of by train. It is not even shown that by so doing he was likely to reach the office sooner, and it may well have been that in view of the date and time, namely, midday in early summer, his preference was due to this mode of transit being the more attractive.

The case, therefore, seems to me rather to fall within the principles of *Slade* v. *Taylor* (2) than within those of *Pierce* v. *Provident Clothing and Supply Co.* (3)

Appeal allowed.

Solicitors: *William Hurd & Sons; Sismey & Co., for George Clinch, Gravesend.*

(1) 9 B. W. C. C. 136. (2) 8 B. W. C. C. 65.
(3) [1911] 1 K. B. 997.

R. M.

[COURT OF CRIMINAL APPEAL.]

1916
April 10.

THE KING *v.* WILLIS.

Criminal Law—Evidence—Accomplice—Corroboration by Wife of another Accomplice.

On the trial of an indictment one of several accomplices in the crime charged was called as a witness against the accused. His evidence was corroborated by that of the wife of another accomplice who was not called. The wife was herself innocent of any connection with the crime :—

Held, that under those circumstances the jury were entitled to rely upon her evidence as good corroboration, and that the mere fact that she was the wife of an accomplice, and that her evidence was not itself corroborated by an independent witness, did not disentitle it to credit.

Semble that *Rex* v. *Neal* (1835) 7 C. & P. 168 was wrongly decided.

APPEAL to the Court of Criminal Appeal.

The appellant Willis was indicted at the London Sessions with three other men named Poulton, Brooks, and Savage for stealing and receiving twenty-seven chests of tea. The last three pleaded guilty. Willis pleaded not guilty and was tried. At the trial the prisoner Poulton was called as a witness for the prosecution. He was a carman. His evidence was that on Christmas Eve, the day of the larceny, he drove a van containing the stolen tea to the shop of the prisoner Brooks. When he got there Willis was in the shop parlour with Brooks. Witness carried the tea into the parlour. Brooks was writing out a cheque which Willis put into his pocket. Willis told witness to drive away the van and wait outside the shop of a man named Robert Davis. Willis came there and asked Davis to lend him 30*l.* on the cheque. Davis did so, and Willis handed the 30*l.* to the witness, who gave him back 3*l.* for himself. Robert Davis was also called as a witness. Although not charged with the larceny he admitted that he was a party to it. He said that on the day in question he went to Brooks's place and saw Mrs. Brooks in the shop and Willis and Poulton in the parlour with Brooks. There were chests of tea in the parlour. Willis asked Brooks for a cheque. Mrs. Brooks was angry and told her husband

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not to give a cheque. She told Willis that he ought to be ashamed of bringing the tea to her place. Brooks gave Willis 3*l.* in Treasury notes. Witness had 10*l.* out of the transaction. He knew it was a dishonest one. The prisoner Brooks was not called as a witness, but his wife was. She deposed that she was in her shop on the evening of Christmas Eve when Willis arrived. He went into the parlour with her husband. She saw cases being brought into the parlour. She suspected the goods were stolen, and complained to Willis that he had no right to bring such things there, and he replied that he thought he was doing her husband a good turn. She had some words with her husband, and then went away for twenty minutes. On her return she found Willis and Davis with her husband. Willis said he must get Brooks to sign a cheque. She protested against her husband doing so. Brooks went to the till and gave Willis three or four Treasury notes. Mr. Purcell, who appeared as counsel for the appellant at the trial, contended that as Poulton and Davis were accomplices their evidence ought not to be acted upon by the jury in the absence of corroboration, and that the evidence of Mrs. Brooks afforded no such corroboration upon the ground that she was the wife of another accomplice, and as she was in law one with her husband her evidence must be treated as if it had been given by him, and therefore itself required corroboration by an independent witness. He asked the deputy-chairman, on the authority of *Rex* v. *Neal* (1), to direct an acquittal. He also contended that even if her evidence was to be treated as corroboration at all it did not corroborate the accomplices in particulars implicating the accused, which it was contended that, according to *Rex* v. *Cohen* (2), it was necessary it should do. The deputy-chairman refused to direct an acquittal, or to warn the jury that the evidence of Mrs. Brooks ought not to be acted upon in the absence of corroboration. Willis was convicted and appealed against his conviction.

Huntly Jenkins, for the appellant. The deputy-chairman was wrong in treating the evidence of the wife of an accomplice as corroboration. In Archbold's Criminal Pleading, 24th ed., at p. 457, it is said that "The testimony of the wife of an accomplice

(1) 7 C. & P. 168. (2) (1914) 10 Cr. App. R. 91.

is not such evidence as a jury ought to rely upon as confirmation of his statement." That proposition is supported by the case of *Rex* v. *Neal* (1), where, the only evidence tendered in corroboration of an accomplice being that of his wife, the judge held that it was no corroboration and directed an acquittal. But even if the deputy-chairman did not adopt the extreme course of directing an acquittal he ought at least to have warned the jury that they should not rely on her evidence unless it was itself corroborated : *Rex* v. *Payne*. (2) Although Mrs. Brooks was herself innocent of any connection with the crime, the fact that she was the wife of a participant in it who had not yet been sentenced might induce her to say what was untrue for the purpose of throwing the blame on the appellant, in the hope that she might thereby affect her husband's sentence. Her evidence ought to be treated exactly as her husband's evidence would have been treated if he had been called, and in his case the jury would have been cautioned. (3)

Roland Oliver, for the prosecution, was not called upon.

The judgment of the COURT (Lord Reading C.J., Ridley and Avory JJ.) was delivered by

LORD READING C.J. The appellant Willis was convicted of feloniously receiving twenty-seven chests of tea, and from that conviction he now appeals. He was indicted along with three other men, named Poulton, Brooks, and Savage, for stealing and receiving the tea in question. Those three men pleaded guilty. Willis pleaded not guilty and was tried. At the trial amongst the witnesses called for the Crown was the prisoner Poulton, and a man named Davis, who on his own admission had participated in the larceny. Their evidence, although that of accomplices, was undoubtedly admissible, but the judge in such a case is bound to caution the jury that they ought not to act on such evidence unless it is corroborated ; and here the deputy-chairman in fact so directed them. Then a Mrs. Brooks was called who gave evidence corroborating that of Poulton and Davis. She was the wife

(1) 7 C. & P. 168.

(2) (1913) 8 Cr. App. R. 171.

(3) At the hearing of the appeal no point was taken by counsel for the appellant as to the necessity of the corroborative evidence being such as to implicate the accused.

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of the prisoner Brooks, who had pleaded guilty. Brooks, the husband, was not called as a witness. Mrs. Brooks gave evidence that she was not herself concerned in the theft, that she had protested against the part her husband was induced to take in it, and endeavoured to persuade him to have nothing to do with it. The truth of her statement was not disputed, and it was conceded that she was not in any way an accomplice. But it was argued, both at the trial and also before us, that as she was the wife of a person who had participated in the crime, and as husband and wife are one in law, her evidence ought to be regarded as if it had been given by Brooks himself. The deputy-chairman did not accept that view; he thought that her evidence was not to be treated as if it was the evidence of an accomplice, and that the mere fact that she was the wife of a man who had taken a part in the theft was not enough to impose a duty on the judge to caution the jury against acting upon her evidence unless it was itself corroborated. On behalf of the appellant reliance was placed on a passage in Archbold's Criminal Pleading, 24th ed., at p. 457, where it is said that "The testimony of the wife of an accomplice is not such evidence as a jury ought to rely upon as confirmation of his statement." The case cited as an authority for that proposition is *Rex* v. *Neal.* (1) There on the trial of an indictment for larceny at the Oxford Assizes an accomplice of the prisoner was admitted as King's evidence, and the judge, Park J., on being informed that the only witness who could be called to corroborate the accomplice's statement was his wife, said "Confirmation by the wife is, in a case like this, really no confirmation at all. The wife and the accomplice must be taken as one for this purpose"; and he directed an acquittal. That decision that the prisoner in such a case is as a matter of law entitled to be acquitted is in our opinion wrong, the duty of the judge being, even if the wife is to be treated as one with her husband, to leave the case to the jury with a warning against relying on her evidence in the absence of further corroboration. But it is unnecessary to decide that point, for in our opinion that case has no application to the present. There the accomplice whose wife's evidence was held to be inadmissible as corroboration was the witness whom she was tendered to corroborate; whereas here

(1) 7 C. & P. 168.

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Brooks was not called. Her identity in law with her husband, if that was the ground of the decision in *Rex* v. *Neal* (1), cannot affect the question of the admissibility of her evidence for the purpose of corroborating a third person. We think that that case is no authority for the proposition that Mrs. Brooks's evidence is to be treated as if it had been given by her husband, and that the deputy-chairman was quite right in refusing so to deal with it. At the trial Mr. Purcell, who then appeared as counsel for the appellant took a further point on his behalf, that the evidence of Mrs. Brooks, even if admissible at all, would be unavailing as corroboration unless it corroborated Poulton and Davis in some material particular implicating the appellant, which it was contended it did not. That point was not argued before us, but as there seems to be some misconception as to the present state of the law upon that subject, we think it would be well to take this opportunity of clearing up the matter and restating the rule. There are certain statutes which provide that certain classes of evidence shall be insufficient to support a conviction unless corroborated by some other material evidence implicating the accused; but corroboration where required by the common law is not subject to any such qualification. In *Rex* v. *Everest* (2), which was a case of larceny, it was indeed said that "the judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some particular which goes to implicate the accused." But in the later case of *Rex* v. *Wilson* (3), a case of burglary, this Court took a different view. Lord Alverstone C.J. said: "It must not be supposed that corroboration is required amounting to independent evidence implicating the accused"; and that view was confirmed in *Rex* v. *Blatherwick* (4), where Lord Alverstone C.J. said arguendo: "*Everest* (2) goes too far; *Wilson* (3) is the correct statement of the law." Those two cases finally set the matter at rest. But the question came again before this Court in *Rex* v. *Cohen*. (5) In that case the principal witness against the prisoner was an accomplice, and one question was whether there was sufficient corroboration of his evidence. In the course of

(1) 7 C. & P. 168.
(2) (1909) 2 Cr. App. R. 130.
(3) (1911) 6 Cr. App. R. 125, 128.
(4) (1911) 6 Cr. App. R. 281.
(5) 10 Cr. App. R. 91, 101.

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delivering the judgment of this Court I there said: "We will assume for the purposes of this case, and without deciding it, that the test laid down in *Everest* (1) is the right test to apply." The Court then proceeded to examine the evidence and came to the conclusion that even from that point of view there was abundant corroboration of the accomplice, and they accordingly confirmed the conviction. But in the argument at the trial in the present case it seems to have been assumed from what I so said in *Rex* v. *Cohen* (2) that I intended to throw doubts upon the decisions in *Wilson's* (3) and *Blatherwick's Cases* (4) and to reaffirm the rule as laid down in *Everest's Case.* (1) That is a mistake. I there said: "The rule which we propose to apply in this case is that most favourable to the appellant's contention." What I meant was that even if the law had been as was laid down in *Everest's Case* (1) it would not help the appellant, that assuming the statement of the rule that was most favourable to him there would still be sufficient corroboration. This Court had no intention and indeed had no power to unsettle the law as established in *Rex* v. *Wilson* (3) and *Rex* v. *Blatherwick.* (4) We think that in the present case there is no ground for interfering with the conviction and that the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Peet & Manduell.*
Solicitor for the Crown: *Director of Public Prosecutions.*

(1) 2 Cr. App. R. 130.
(2) 10 Cr. App. R. 91, 101.
(3) 6 Cr. App. R. 125, 128.
(4) 6 Cr. App. R. 281.

J. F. C.

[IN THE COURT OF APPEAL.]

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Jan. 14, 17; 18, 19.
Feb. 4.

JAGER *v.* TOLME & RUNGE AND THE LONDON PRODUCE CLEARING HOUSE, LIMITED.

[1914 J. 1389.]

Contract—Sale of Sugar—London Produce Clearing House Regulations 19, 20—*Rules of Sugar Association of London, rule* 491B—*Privity of Contract—Tender—Closed Contract—"Party to the contract"—Right to appeal to Council of Sugar Association for a Decision—Duty of Council on such Appeal.*

By a contract made in July, 1914, the plaintiff, who carried on business in England, purchased 1000 bags of beetroot sugar f.o.b. Hamburg, August delivery. The contract was expressed to be in accordance with the rules and regulations of the Sugar Association of London and subject to the regulations of the London Produce Clearing House, Limited. It contained a clause that "this contract shall be forthwith registered with the London Produce Clearing House, Limited, and subject to its regulations when so registered shall take effect as if the respective parties hereto had contracted with the London Produce Clearing House, Limited, instead of each other, and upon such registration all liability of the parties to this contract to each other shall cease." The contract was registered with the Clearing House.

By regulations 19 and 20 of the Clearing House every buyer shall be bound to accept in fulfilment of his contract any tender either passed on to him by the Clearing House or made to him direct on behalf of the Clearing House by a seller duly authorized by the Clearing House to do so, and the Clearing House may put the tenderer and receiver into direct communication, in which case all declarations, notices, the delivery of documents, and payment of invoice shall pass between tenderer and receiver direct. By rule 491A of the rules of the Sugar Association of London, in the event of Germany being involved in war with England the contract, unless previously closed, shall be deemed to be closed on certain terms. By rule 491B, "For the purposes of the war clause a contract against which a tender has been made shall be deemed a closed contract. Should the state of war prevent shipment or warehousing and/or passing of documents, then any party to the contract shall be entitled to appeal to the council [of the Association] for a decision which shall be binding on all concerned."

On July 31, 1914, the German Government placed an embargo on the export of sugar from Germany. On August 1 the Clearing House tendered to the plaintiff in fulfilment of his contract 1000 bags of sugar identified by marks and numbers. These bags were

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part of a larger number of bags of sugar which the defendants, who carried on business in London, on May 1, 1914, had sold to other purchasers for August delivery on the same terms as those contained in the plaintiff's contract, and this contract was registered with the Clearing House. The sugar was at the time of tender in the free port of Hamburg. On August 4 war was declared between Great Britain and Germany, and on a subsequent date in August the Clearing House disclosed to the plaintiff the names of the defendants as the sellers of the sugar, and put them into direct communication with each other in accordance with regulations 19 and 20. The plaintiff declined to carry out the contract on the ground that it would be illegal to do so after the declaration of war. The defendants appealed to the council for relief under rule 491B and asked the council to fix a price at which the sugar should be invoiced back to them. In an action by the plaintiff for a declaration that he was released from the contract and for an injunction to restrain the defendants from proceeding with any appeal to the council :—

Held, that there was no privity of contract between the plaintiff and the defendants, the contract remaining one between the plaintiff and the Clearing House, and that therefore the defendants were not a "party to the contract" with the plaintiff within the meaning of rule 491B, and were not entitled to appeal to the council for a decision ; and that the further performance of the contract became illegal on the outbreak of war as it would have involved commercial intercourse with the enemy.

Held, also, that the tender of the sugar was a valid tender under the rules notwithstanding the embargo, and that the sugar was at the time of tender "free of Customs formalities."

Under rule 491B the council, upon an appeal to them by a party to a contract, can only decide according to the legal rights of the parties, and are not entitled to decide what in their opinion is fair and reasonable to be done as between the parties in the circumstances.

The obtaining of an award under rule 491B is not a condition precedent to the right to sue in respect of a claim arising under a contract.

APPEAL from the judgment of Sankey J. at the trial of the action without a jury.

The plaintiff claimed certain declarations and an injunction as hereinafter mentioned.

The following statement of facts is taken substantially from the judgment of Swinfen Eady L.J. :—

On June 12, 1914, the plaintiff, who carried on business at Liverpool, purchased of Edward Grey & Co. 2000 bags beetroot sugar (every 500 bags being equal to about 985 cwt. 0 qrs. 25 lbs.), 88°, f.o.b. Hamburg, August delivery, at 9*s.* 7¼*d.* per cwt. Only a part

of this parcel, namely 500 bags, was in dispute. On July 8, 1914, the plaintiff purchased through brokers another 500 bags of beetroot sugar, 88°, f.o.b. Hamburg, August delivery, at 9*s.* 3¾*d.* per cwt. Both the contracts were in the same terms, so far as material. The transaction was expressed to be "in accordance with the rules, regulations, and by-laws of the Sugar Association of London, and of the clearing department thereof" (1); and also "subject to the regulations and conditions of the London Produce Clearing House, Limited, for sugar future delivery business" (2), and subject to war clause as printed overleaf. (3) The contracts also contained a clause in these words: "This contract shall be forthwith registered with the London Produce Clearing House, Limited, and subject to its regulations when so registered shall take effect as if the respective parties hereto had contracted with the London Produce Clearing House, Limited, instead of each other, and upon such registration all liability of the parties to this contract to each other shall cease."

Both the contracts were duly registered with the Clearing House, and thereupon the position was the same as if the plaintiff had originally made each of the two contracts of purchase with the Clearing House. The liability of the original sellers to the plaintiff was at an end, and the Clearing House had become the sellers to the plaintiff on the same terms.

The effect of the incorporation into the contract of the rules, regulations, and by-laws of the Sugar Association of London and of the clearing department thereof, and the regulations and conditions of the London Produce Clearing House, Limited, for sugar future delivery business, is to provide in considerable detail for the way in which the contracts shall be carried out. By regulation 6 of the London Produce Clearing House, Limited (in the regulations called the company), a deposit by way of cover is furnished to the company by contracting parties, and remains with the company until the contract against which it stands shall be closed, fulfilled, or liquidated. By regulation 7 the company gives a separate "certificate of guarantee" for each 500 bags of a contract, declaring that

(1) See note (1), p. 962, post.
(2) See note (2), p. 963, post.
(3) The war clause was identical in terms with rule 491A of the rules of the Sugar Association of London.

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it is responsible under the terms of its regulations; and by regulations 9 and 10 margins are to be regulated by the daily official quotations of sugar, and further deposits or further security must be given by contracting parties to the company when the book value of a contract shows depreciation. [Regulations 19 and 20 are set out in note (2), p. 963, post.] By regulation 21 margins are due on all sugars under tender until documents shall have passed.

On July 31 the plaintiff received from the Clearing House a telegram as follows: "Tender Z.K. 140. Z.J. 193. Germans. 1000 bags. Valid to-morrow." The effect of this telegram was that the Clearing House tendered as on August 1 1000 bags to the plaintiff with the marks and numbers given in the telegram, which sufficiently earmarked the particular sugar—500 bags Z.K. 140 and 500 bags Z.J. 193. This was a tender within the regulations. It was a notice that the sugars were ready for shipment at Hamburg free of Customs formalities. On July 31, 1914, the German Government placed an embargo on the export of sugar from Germany, and on August 4 at 11 P.M. a state of war arose between Great Britain and Germany. On August 6 the Clearing House applied to the plaintiff for further cover in respect of sugar to the extent of about 253*l.*, enclosing a statement showing that the margin required on sugar was 1200*l.*, while the plaintiff's security was 1000*l.* only, and there was a further 53*l.* 13*s.* 6*d.*, a balance to their debit. In this statement it was said that for the purpose of margins August tenders were calculated against a price of 6*s.* until documents had passed. The plaintiff answered this application by a letter of August 7, stating that the Royal Proclamation (1) made it illegal to proceed further with these tenders, and that the original contracts therefore were then void. On August 8 the four working days within which the plaintiff had, under rules 420—422 of the rules of the Sugar Association, to give either shipping or storing instructions expired. It subsequently appeared that the sugar so tendered to the plaintiff was part of certain bags of sugar which the defendants Tolme & Runge had by a contract of May 1, 1914, sold to other purchasers 88°, f.o.b. Hamburg, August delivery, at 9*s.* 7*d.* per cwt., the

(1) August 5, 1914. See Manual of Emergency Legislation, 1914, p. 375.

contract containing terms similar to those on which the plaintiff contracted to purchase the sugar in question, and this contract was registered with the Clearing House, and this sugar was duly tendered by Tolme & Runge to the Clearing House. The sugar was at the time of tender lying in a warehouse at Stillhornerdam in the free port of Hamburg. The names of Tolme & Runge in connection with the sugar were not disclosed to the plaintiff until he received a letter from the Clearing House dated August 12, 1914, stating that the sellers were Messrs. Tolme & Runge; and on August 18 by letters of that date the Clearing House put Tolme & Runge and the plaintiff into direct communication with each other in accordance with regulations 19 and 20 as the tenderer and receiver of the sugar respectively, adding in each letter, "You will please therefore communicate direct with the above firm on any matters concerning tenders, &c." On August 20 the plaintiff wrote to the Clearing House in reply stating that "as we do not acknowledge the legality of the tender, we decline to have anything to do with it." On August 29 Tolme & Runge wrote to the Clearing House stating that the Clearing House had under regulations 19 and 20 brought them into direct communication with the ultimate buyer as receiver of the above-mentioned tenders, and they claimed relief under rule 491B owing to the impossibility of producing warrants; that they tendered on August 1 through the London Produce Clearing House to buyer the sugar, and instructions became due on August 8; that all shipping instructions were then impracticable; that the buyer therefore had under rule 422 to give storing instructions, and in this he defaulted; that in default of instructions the sugar was stored against buyer; that they were, however, unable to present warrants, and for that they sought relief under rule 491B; and they asked the council to fix a price at which the goods should be invoiced back to them, stating that in all other respects the case was identical with the one which they brought against Messrs. E. Grey & Co., and which was adjudicated upon on August 24 and 25. (1)

The firm of Tolme & Runge carried on business in the city of London. There were three partners, all British subjects, one of whom, however, was also a partner in a German firm at Hamburg,

(1) The award of the council was set aside by the Divisional Court on October 28, 1914 (*Tolme v. Grey & Co.*, not reported).

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and on the outbreak of war he was residing at Hamburg and continued to reside there.

The plaintiff thereupon brought this action against Tolme & Runge and the London Produce Clearing House, Limited, claiming :—

(1.) A declaration that the contracts were void and incapable of performance by reason of the embargo which then continued and would continue during the existence of a state of war between Great Britain and Germany, and that the plaintiff was released from the contracts.

(2.) Further, or in the alternative, a declaration that the contracts were illegal and void by reason of the state of war which had existed since August 4, 1914, between Great Britain and Germany and by reason of the Proclamations whereby the carrying out of such contracts was forbidden, and that the plaintiff was released from the contracts.

(3.) An injunction to restrain the defendants or any of them from proceeding or attempting to proceed with any appeal to the council under the rules of the association in regard to any question or matter arising or alleged to arise out of the contracts.

Sankey J. gave judgment for the defendants. (1) The plaintiff appealed.

Greer, K.C., and *A. R. Kennedy*, for the plaintiff. The contract with the plaintiff was that he should be tendered sugar at Hamburg which he could export. The embargo of July 31 prevented the sugar being exported, and therefore the tender of August 1 was a bad tender. The contracts must accordingly be treated as open contracts within rule 491A and not as closed contracts within rule 491B of the rules of the Sugar Association. The plaintiff's liabilities under the contracts were determined on August 1 because the sellers could not give him what he had purchased, namely, sugar which he could export from Hamburg. The carrying out of the embargo rested with the Customs authorities at Hamburg, and therefore the sugar was not "free of all Customs formalities" as required by rule 406 of the rules of the Sugar Association.

Even if the tender was a valid tender, the prohibition against export destroyed the basis of the contracts, and they became

(1) (1915) 31 Times L. R. 381.

impossible of performance on the principle laid down in *Taylor* v. *Caldwell* (1) and *Krell* v. *Henry*. (2) The plaintiff was entitled to the option to ship or warehouse the sugar, and he was not bound to warehouse: *Grey & Co.* v. *Tolme*. (3) But it is doubtful whether this point is open in this Court after the decision in *Smith, Coney & Barrett* v. *Becker, Gray & Co.* (4)

Next, the further performance of the contracts became illegal on the outbreak of war, and both parties were absolved from performing them. The sugar had, under the rules of the association, to be weighed, analysed, and sampled at Hamburg, and the bags examined to see if any were damp or sweated. This would have involved commercial intercourse with the enemy: *Porter* v. *Freudenberg* (5), citing *The Hoop* (6); *Karberg & Co.* v. *Blythe, Green & Co.* (7); *Robson* v. *Premier Oil and Pipe Line Co.* (8); *The Panariellos*. (9) The Proclamation of August 5, 1914, prohibits a person obtaining his own goods from the enemy without permission from the Crown: *Rex* v. *Oppenheimer* (10); *The Rapid*. (11)

The defendants claim in the circumstances to be entitled to apply to the council of the Sugar Association under rule 491B of the rules of the Sugar Association for a decision as to what is fair to be done as between the parties. In the first place the defendants are not a "party to the contract" with the plaintiff within the meaning of the rule and cannot claim to appeal to the council under that rule. By the contracts the plaintiff and the defendants contract with the Clearing House, but do not contract with each other. There is no privity of contract between the plaintiff and the defendants. Even if there is privity of contract, the appeal to the council is for a decision as to the legal rights of the parties, and not for a decision as to what the council in their discretion think ought to be done. The council cannot make a new contract between the parties. This was decided in *Tolme* v. *Grey & Co.* (12) by a Divisional Court

(1) (1863) 3 B. & S. 826.
(2) [1903] 2 K. B. 740.
(3) (1915) 31 Times L. R. 551, 553.
(4) (1915) 84 L. J. (Ch.) 865.
(5) [1915] 1 K. B. 857, 867.
(6) (1799) 1 C. Rob. 196.
(7) [1915] 2 K. B. 379; [1916] 1 K. B. 495.
(8) [1915] 2 Ch. 124.
(9) (1915) 84 L. J. (P.) 140.
(10) [1915] 2 K. B. 755.
(11) (1814) 12 U. S. 155.
(12) October 28, 1914, not reported. A transcript of the shorthand note of the judgment was before the Court.

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consisting of Lord Coleridge, Scrutton, and Shearman JJ. The clause is an arbitration clause within the Arbitration Act, 1889, in substitution for that provided by rules 352, 353. The council could only come to one decision if the matter was referred to them, namely, that the further performance of the contracts became illegal owing to the war. The plaintiff is therefore entitled to an injunction restraining the defendants from proceeding with the appeal to the council under rule 491B, and to a declaration as to his legal rights in the matter.

Further, if there was privity of contract between the plaintiff and the firm of Tolme & Runge, inasmuch as one of the partners in that firm, who was also a partner in an enemy firm, became an alien enemy on the outbreak of war on August 4 by voluntarily residing and carrying on business in Germany after that date, the firm cannot sue or take any proceedings to enforce the contracts. The Proclamation of August 5, 1914 (1), forbade dealings with "any person resident, carrying on business, or being" in the German Empire without the permission of the Crown. The contracts were with the three partners jointly, and the Court cannot strike out the partner who became an enemy by voluntarily residing in Germany and thus adhering to the King's enemies after the commencement of the war, and allow the two remaining partners to sue: *M'Connell* v. *Hector* (2); *O'Mealey* v. *Wilson*. (3) A partnership cannot sue if one partner is an alien enemy: Story on Partnership, 7th ed., s. 240. The plaintiff cannot be called upon by the Clearing House to perform his contract with a firm one of whose members is an enemy. The contract is a joint contract, and as it was unperformed at the outbreak of war it became void, and none of the partners can take any proceedings to enforce it.

Sir Robert Finlay, K.C., and *Roche*, K.C. (*R. A. Wright* with them), for the defendants Tolme & Runge. The tender of August 1 was a valid tender under the rules, and the embargo on the export of sugar did not render it invalid: *Smith, Coney & Barrett* v. *Becker, Gray & Co.* (4) The plaintiff had the option of storing the sugar. That being so, the contract was closed upon the

(1) Manual of Emergency Legislation, 1914, p. 375.
(2) (1802) 3 Bos. & P. 113.
(3) (1808) 1 Camp. 482.
(4) 84 L. J. (Ch.) 865.

tender being made, and rule 491B applies. Tolme & Runge were under the provisions of regulations 19 and 20 of the London Produce Clearing House Regulations and what was done thereunder made "parties to the contract" with the plaintiff, and are entitled to apply to the council for a decision. Privity of contract was established on August 1 when the Clearing House tendered to the plaintiff 1000 bags of sugar identified by numbers and marks, and the subsequent communication of the names of the sellers related back to that date. The plaintiff knew that the tender was on behalf of a seller whose name would be given later. If not at that time, privity of contract was established when the names of the sellers were given to the plaintiff by the Clearing House. The function of the council in such a case is not merely to arbitrate as to the legal rights of the parties. Rules 352 and 353 deal with an arbitration properly so called. The council on an appeal under rule 491B can say what is the fair thing to be done considering the new circumstances which have arisen. The latter part of rule 491B corresponds with the power given to the council in the case of an open contract to invoice back under rule 491A. There is nothing in rule 491B which directs the council to do anything illegal: *Smith* v. *Becker, Gray & Co.* (1), which, though decided on rule 491A, is equally applicable to rule 491B. It is a condition precedent to the right to sue that the amount should have been fixed by the council under rule 491B. [*New York Life Insurance Co.* v. *Statham* (2) was also referred to.]

The property in the sugar had passed to the plaintiff, and there is nothing illegal in a British subject taking steps to protect his property in an enemy country, and "the circumstances of this case may be taken as virtually amounting to a licence, inasmuch as if a licence had been applied for it must have been granted": *The Madonna delle Gracie.* (3) The licence of the Crown in this case for such a purpose was not necessary, and if it were the correspondence shows that there would have been no difficulty in obtaining it. Therefore the further performance of the contracts as claimed by the defendants Tolme & Runge was not rendered illegal by the war. The Court ought not to hold that the further performance of

(1) 84 L. J. (Ch.) 865. (2) (1876) 93 U. S. 24.
(3) (1802) 4 C. Rob. 195, 198.

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the contracts had become impossible, and that therefore the contracts ought to be treated as dissolved, if by any reasonable construction they can be treated as still capable, in substance, of being performed : *The Teutonia.* (1) [*Kershaw* v. *Kelsey* (2) was also referred to.]

With regard to the contention that the defendants cannot take proceedings upon the contract because one member of the firm with whom the contract was made became an alien enemy by voluntary residence in Germany, the answer is that he ceased to be a member of the firm by so residing, and the two remaining members of the firm who are not enemies can take proceedings to enforce the contract. Otherwise the assets of the partnership could not be got in. The enemy partner can be added as a defendant to protect his rights : *Luke* v. *South Kensington Hotel Co.* (3) ; *Cullen* v. *Knowles* (4) ; and any sum to which he may be entitled will be paid to the Public Trustee. There is nothing unlawful in carrying out the contract though an enemy is interested in it. If the contractual relationship between the plaintiff and Tolme & Runge came into existence on August 1, no question of an enemy partner could arise then, and the contract was a valid contract and could be enforced after the war by the two remaining partners. If on the other hand the contractual relationship first arose on August 12 when the names were communicated to the plaintiff, the enemy partner had at that date ceased to be a member of the firm, and therefore the contract was not with an alien enemy. [*Roberts* v. *Hardy* (5), *Ingle* v. *Mannheim Insurance Co.* (6), and Hall's International Law, 6th ed., pp. 494, 495, were also referred to.]

G. Wallace, K.C., and *Stuart Bevan*, for the London Produce Clearing House, Limited, submitted that, as they had not made any claim against the plaintiff, they had been made parties to the action unnecessarily. They supported the arguments urged on behalf of their co-defendants.

Greer, K.C., in reply.

Cur. adv. vult.

Feb. 4. SWINFEN EADY L.J. read the following judgment :— This action is brought to determine the rights of the parties with

(1) (1872) L. R. 4 P. C. 171, 182.
(2) (1868) 100 Mass. 561.
(3) (1879) 11 Ch. D. 121.
(4) [1898] 2 Q. B. 380.
(5) (1815) 3 M. & S. 533.
(6) [1915] 1 K. B. 227.

reference to certain contracts for the sale and purchase of beetroot sugar f.o.b. Hamburg. Sankey J. tried the action without a jury and gave judgment for the defendants, and against this judgment the plaintiff appeals. The defendants had a counter-claim, which, however, was abandoned at the trial. [The Lord Justice stated the facts, in the course of which he said, as stated above, that upon the plaintiff's contracts being registered with the Clearing House "the position was the same as if the plaintiff had originally made each of the two contracts of purchase with the Clearing House. The liability of the original sellers to the plaintiff was at an end, and the Clearing House had become the sellers to the plaintiff on the same terms."]

A state of war arose between England and Germany as from 11 P.M. on August 4, and it is necessary to consider what the position was on August 7 when the plaintiff's letter of that date was written. On July 31 the German Government had placed an embargo on the export of sugar from Germany. This, however, did not prevent the tender of August 1 from being a good tender. The embargo might have proved to be merely a temporary measure and removed at once, or the buyer might have been content to take delivery in warehouse and not export for a time: see *Smith, Coney & Barrett* v. *Becker, Gray & Co.* (1) In my judgment the tender was a valid one as of August 1, 1914.

It was urged that the sugar was not "free of Customs formalities," as, although in the *Freihafen* at Hamburg, the Customs authorities would not allow it to be shipped. This, however, was only in consequence of the embargo. The sugar was, in my opinion, "free of Customs formalities" within the meaning of the rules and regulations, although not at that date capable of being exported by reason of the embargo.

By the terms of the written contract the plaintiff bought the sugar upon terms of "free on board at Hamburg." As, however, the rules, regulations, and by-laws of the Sugar Association of London were incorporated, reference must be made to these rules, and by rules 420—422 the buyer has the option of giving within four working days from date of tender either "practicable shipping instructions" or "practicable storing instructions," each of which

(1) 84 L. J. (Ch.) 865.

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expressions is defined. If the buyer determines to take delivery on board ship, then by rule 427 the seller will use every endeavour to engage freight room and to expedite shipment. The option of taking delivery on ship or in warehouse is with the buyer, and by rule 458 payment is to be made against the bills of lading, if shipped, or against warrants and insurance certificate, if stored. In the present case the seller could not deliver by shipping, in pursuance of his contract, by reason of the continuance of the embargo and the subsequent war.

In my opinion, the contention raised by the buyer in his letter of August 7, 1914, is well founded, that the further performance of the contract became illegal on the outbreak of war, and both parties were absolved from performing it. The plaintiff could not proceed with the contract without commercial intercourse with the enemy. By rule 404 the country of origin of the sugar tendered must be stated in the tender, and by rule 413 the sugar must be the product of a country that is a party to the Brussels Convention, and the tender in the present case specified the sugar as German. This German sugar, lying in a warehouse at Hamburg, was then the subject of the contract; before the price payable for it could be finally determined, even if the buyer elected to take delivery in a warehouse in Hamburg, it must be weighed, as the weight notes were already upwards of two months old (rule 431), sampled by the general agency, analysed by German chemists (rule 426), the parcel examined by the general agency for damp and sweated bags (rules 441, 462), also for damaged sugar (rules 464, 465, 466); all these operations must be carried out at Hamburg under the supervision of the general agency at Hamburg (rule 326), which is an enemy person. The scale of charges of the agency for their work is set out at p. 169 of the Book of Rules of the Sugar Association of London. Having regard to the nature of the contract, and what remained to be done under it, I am of opinion that on August 7 it had become dissolved by reason of the war, and neither party was entitled to require the other to proceed further with it.

I now pass to the consideration of rules 491A and 491B. The former provides for the event of Germany being involved in a war with either England, France, Russia, and/or Austria, while the contract is still open, not having been closed. The next rule (491B) provides

that, for the purpose of the preceding clause, a contract against which a tender has been made shall be deemed a closed contract, that is to say, shall be deemed a contract already "previously closed" within the meaning of rule 491A. In the present case, therefore, rule 491B is the rule which applies, and not rule 491A. The rule then provides that "should the state of war prevent shipment or warehousing and/or passing of documents, then any party to the contract shall be entitled to appeal to the council for a decision which shall be binding on all concerned." It was urged by the defendants Tolme & Runge that they were a "party to the contract," that they were entitled to appeal and had appealed to the council, i.e., the council of the Sugar Association, and that the only remedy of either party was a decision of the council, and that the Court had no jurisdiction to entertain the dispute. Tolme & Runge claim to be a "party to the contract" with the plaintiff because they tendered the sugar in question to the Clearing House on August 1, and on August 12 their names were disclosed by the Clearing House to the plaintiff as being the sellers of the parcels of sugar in question, and on August 18 the Clearing House wrote to the plaintiff that the tender of the sugar was that of Messrs. Tolme & Runge, "with whom we hereby put you in direct communication in accordance with paragraphs 19/20, Part II., of our regulations, of which we enclose a copy. You will please therefore communicate direct with the above firm on any matters concerning tenders, &c." The plaintiff wrote in reply to the Clearing House on August 20 that he did not acknowledge the legality of the tender, and declined to have anything to do with it.

Under these circumstances, is there any privity of contract between the plaintiff and the defendants Tolme & Runge? Unless there is, the defendants Tolme & Runge are not entitled as a "party to the contract" to appeal to the council to settle a dispute between the plaintiff and themselves. In my opinion the effect of regulations 19 and 20, Part II., of the Clearing House Regulations is to enable the Clearing House to require a buyer to take delivery of sugar from a seller indicated by them, and to pay against documents the price which the Clearing House fixes as the price at which the tender is to pass between the two parties, and also to settle allowances between tenderer and receiver, but the contract remains a contract

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between the plaintiff and the Clearing House; there is not any novation; the buyer must pay direct to the Clearing House any difference between the price fixed by the Clearing House as that at which the tender shall pass and the contract price; the buyer also remains bound by contract with the Clearing House to take delivery as agreed from the nominee of the Clearing House; the contractual relationship remains between buyer and Clearing House, and there is not substituted for it a new contractual relationship between buyer and tenderer. Indeed, in the present case the plaintiff refused in his letter of August 20 to enter into any relationship with the tenderer, and there is no room for implying any such new contract. In my judgment, as between the plaintiff and the defendants Tolme & Runge the latter were not entitled to make the application to the council of the Sugar Association which they made on August 29, 1914, and in which they referred to a dispute between themselves and the plaintiff, stated their tender and that instructions became due on August 8, that shipping instructions were impracticable, and that they were unable to present warrants, but nevertheless asking the council to fix a price at which the goods should be invoiced back to them. They mention that the case is identical with one which they brought against Messrs. E. Grey & Co., and which had already been adjudicated upon by the council, but this award has since been set aside as invalid by an order of the Divisional Court. (1)

Again, I am of opinion that according to the true construction of rule 491B the Court is not thereby precluded from entertaining the matter of a dispute about which an appeal to the council has been made by a party to the contract. There has not been any application to stay this action on the ground of the matter having been referred to arbitration, but it has been suffered to proceed. The jurisdiction conferred on the council is not an exclusive jurisdiction ousting the Court. A perusal of the earlier rules shows that the parties knew how to provide, when they wished to do so, for the obtaining of an award being a condition precedent to the right of either contracting party to sue the other in respect of any claim arising out of any sugar contract: see rule 353. The submission there referred to is to the committee, but under rule 491B it is to the council. In my

(1) *Tolme* v. *Grey & Co.*, not reported.

judgment the words of rule 491B, treated as written into the contract, constitute a submission to arbitration within the meaning of the Arbitration Act, 1889. They are "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not": s. 27.

Then another point was raised as to the meaning of the words "appeal to the council for a decision." The defendants contended that such language left the council entirely at large to order whatever from a business point of view the council might think fair and reasonable, including the making of an entirely new contract between the parties. In my judgment the terse language used will not bear such an extensive interpretation. The council are to give a decision —they are to decide—and in the absence of fuller and wider powers expressly given that means to decide according to the legal rights of the parties. If left to the council, that body would, in my opinion, be bound to decide that the outbreak of war dissolved contracts for futures in sugar, which had previously been closed by what is called a tender, and the performance of which became illegal as involving trading or intercourse with the enemy.

It appears that at the date of the tender and down to the outbreak of war the defendants' firm of Tolme & Runge, to whom the sugar belonged, consisted of three partners, two of whom are in England, and the third partner was and has since remained, and for aught that appears still is, resident in Hamburg, and must therefore be treated as adhering to the King's enemies. If the other questions arising in the action had been decided differently, further points would remain about the right of the Clearing House to pass as tenderer the name of a firm containing an alien enemy as a member and to require the receiver to take delivery from and pay such a firm; and if it be urged that the effect of the war is to bring about a dissolution of the firm, the further question would arise whether a buyer here can be required to pay two out of the three former partners for goods which they cannot deliver, and for which they have neither shipping documents nor warehouse warrants, and which goods appear to be still in an enemy country and under the control of the enemy partner.

The defendants urged that, as on August 1 the contracts became closed contracts by reason of the tender and as the buyer had failed to

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give practicable shipping or storing instructions by August 8, the last day according to the contract for that purpose, the sugar became at the plaintiff's risk—that the sellers were entitled to store against the buyer under rule 486, and that no illegality would have been involved in the plaintiff taking the necessary steps in Germany to safeguard the sugar. These contentions are not, in my judgment, well founded. There was no failure on the part of the buyer "to give practicable instructions" (defined by rules 421 and 422) within the meaning of rule 486; the buyer could not select a warehouse and arrange for the receipt of the sugar by the warehouseman without communicating with Hamburg; he was not bound to accept delivery in warehouse at all, and certainly not in the warehouse in which it was then lying (rule 473). In my judgment, the right of the sellers to store against the buyer under rule 486 never arose.

The Clearing House contended on this appeal that there was no reason for their being introduced into this litigation, as they had not claimed arbitration as Tolme & Runge had done. They also urged that bringing the buyer and seller into communication ought to constitute a contractual relationship between those parties, whether it did or not. But as, in my judgment, the contractual relationship existed between the plaintiff and the Clearing House, and the latter deny that the contract became dissolved by the outbreak of war, or that there was any illegality or impossibility of performance, the plaintiff is entitled to bring them before the Court to have that matter determined. Moreover, the Clearing House by their defence make common cause with Tolme & Runge, and insist that Tolme & Runge were entitled to appeal to the council of the Sugar Association for a decision.

The plaintiff is entitled to a declaration that the contract between himself and the London Produce Clearing House, Limited, for the purchase and sale of 1000 bags of sugar became dissolved on the occurrence of a state of war between this country and Germany on August 4, 1914, and that there was no breach before the war, and that neither party is under any liability to the other in respect thereof; and that there is not and has not been any contract in respect of the same sugar between the plaintiff and the defendants Tolme & Runge; and that the defendants are not, nor is either of

them, now entitled to appeal to the council of the Sugar Association for any decision on the matter.

PICKFORD L.J. read the following judgment :—In this action the plaintiff sued the defendants for several declarations which are set out in the statement of claim. [The Lord Justice read them.] The action arose out of contracts for the sale and purchase of sugar made before the war and unperformed at the time when it began. I do not think it necessary to repeat the facts ; they and the procedure under the rules of the Sugar Association and the London Produce Clearing House are stated in the judgments of Sankey J. and of Swinfen Eady L.J.

The result of the registration of contracts is that there is a novation on each contract, and that the London Produce Clearing House becomes the contracting party with the buyer and seller respectively, and the contract is performed between the first buyer and the last seller, the intermediate transactions being settled through the Clearing House. It was argued that the effect of this was to establish privity of contract between these parties, and I think, as a matter of business, the contracts are so treated. I cannot on the evidence before us in this case see that such privity is established. We were not referred to any term of either contract or to any rule establishing it, and I can find none, and no evidence was given of any course of business to that effect. The effect of regulation 20, Part II., of the Clearing House Regulations is only to provide that performance of the contract is to take place between the first buyer and the ultimate seller by the passing of documents and the delivery of and payment for the goods. This, however, takes place at a price to be fixed by the Clearing House, which is a party to the contract, and there is no provision that it should be discharged and others accepted in its place. As our information may not be complete on the point I do not go further than to say that in this case I can see nothing to establish privity of contract between the plaintiff and Tolme & Runge. The result of this is that Tolme & Runge have no rights as against the plaintiff at all.

But the question still remains between the plaintiff and the Clearing House as to their rights under the contract. The solution of it depends upon the effect of the rules of the Clearing House and the

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Sugar Association, i.e., whether under them the rights of the parties are to be determined according to law or, under rule 491B, according to what the council of the Sugar Association think fair and right, and if according to law what are their legal rights. I think that the tender made by or on behalf of the defendants was a good one. All the requisites of the rules were fulfilled, and the only objection made to the validity of the tender is the embargo laid upon the exportation of sugar by the German Government. I do not think that this embargo affected the validity of the tender. If continued, it might prevent the performance of the contract, but that cannot, in my opinion, interfere with the validity of the tender. If it be necessary to determine the question, I agree with Bailhache J. in *Grey & Co.* v. *Tolme* (1) for the reasons he has given that the property in the goods did not pass to the plaintiff.

There remains to be determined the question of the effect of the war upon the contract, and this depends first upon the construction of the war rules 491A and 491B. This case does not come within rule 491A, and that rule is only important so far as it helps the interpretation of rule 491B. The first part of rule 491B says that the contract is to be deemed to be closed for the purposes of the war rule. It certainly is not closed, as it still remains to be performed, and is not closed by invoicing back as in rule 491A, and this is made clear by the second part of rule 491B, which contemplates a war which may not interfere with the normal performance of the contract.

In my opinion the effect of the first part of rule 491B is simply to provide that in the case of a contract where a tender has been made rule 491A shall not apply. There may be reasons for putting it in the form in which it stands, but I do not at present appreciate what they are. This case therefore falls under rule 491B, and it is necessary to determine the meaning of the second part of that rule. The plaintiff contends that it is an arbitration clause in substitution for that contained in rule 352 and following rules, and means that in the case contemplated by the rule the council are to decide upon the rights of the parties, such determination being made according to law and the council substituted as arbitrators for the committee. The defendants contend that it is a provision corresponding to that in rule 491A, and means that, as in rule 491A the contract is closed by invoicing back

(1) 31 Times L. R. 551.

at certain prices fixed by the rule, so in rule 491B it is to be closed on such terms as the council think fair and right irrespective of the legal rights of the parties. In other words, they contend that the words " appeal to the council for a decision " mean ask the council what in their unfettered discretion they think is the fair and right thing to be done between the parties. It was put by one of the learned counsel in this way, that the council were to act rather as legislators than as arbitrators, and that, as he expressed it, it was left to them as a sugar parliament to enact what should be done under the circumstances.

I do not say that such a provision might not be a wise one from a business point of view, considering the very difficult legal questions raised by an outbreak of war, but I think that it ought to be expressed in the clearest possible terms if it is to have such an effect. These rules govern contracts to which non-members of the association are parties as well as members, and such persons are prima facie entitled to their legal rights, and if those rights are to be taken away and non-members subjected to the arbitrary decision of the council of the association it cannot, in my opinion, be done by ambiguous language.

It was argued by the defendants' counsel that these words are clear and unambiguous and can bear no meaning but that for which they contend. I think they are as ambiguous as words can be. I am not sure that they were not intended to be so ; and on the whole I think that they point more towards the plaintiff's interpretation than the defendants'. To appeal for a decision is not the usual language of a submission to arbitration, but prima facie it means appeal for a decision as to the rights of the parties, and those are prima facie the legal rights, and, in my opinion, there are no sufficient words to substitute another meaning. I regret that I cannot agree with Sankey J. on this point. I think the decision of the Divisional Court in *Tolme* v. *Grey & Co.* (1) is correct, and I adopt the language of Scrutton J. where he says : " If such power is to be inserted, I should expect to find it in clearer words, and I should be very slow to infer it from ambiguous words ; still less from words which appear to me to point to quite the opposite conclusion. . . . . That " (the language of rule 491B) " contemplates the party to the contract who wants to know his rights appealing to the council for a

(1) Not reported.

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decision. Those words seem to me to be not only not unambiguous, but if I may say so point, not with equal force to either contention, but rather more to the fact that the council are asked to say what shall be done under the contract and under the terms of the contract." The result is that, in my opinion, this was an arbitration clause in which an award was not made a condition precedent to an action, and that as no stay has been granted it remains for the Court to determine the rights of the parties in the events that have happened. The position is that there is an executory contract in which a valid tender had been made according to the rules but the time for performance by either party had not arrived before the war began. It could not after that date have been performed either by shipment f.o.b. or by warehousing in Hamburg without commercial intercourse with the enemy, and therefore, in my opinion, it came to an end, and neither party has a right to call upon the other to perform any part of it either by going to arbitration or otherwise. I agree with the reasons for this conclusion given by Swinfen Eady L.J.

I have dealt with the case without reference to the fact that one member of the firm of Tolme & Runge is residing and carrying on business in Germany, and therefore an alien enemy, as in my view no privity of contract is shown to have existed between them and the plaintiff.

BANKES L.J. read the following judgment:—This is the plaintiff's appeal from a decision of Sankey J. refusing to grant him any of the relief asked for in the action. The plaintiff's claim was for a declaration that certain contracts were void and incapable of performance by reason of an embargo placed upon the export of sugar from Hamburg by the German Government, or in the alternative that they were illegal and void in consequence of the war and in consequence of the Proclamations forbidding trading with the enemy, and for an injunction restraining the defendants from proceeding or attempting to proceed with any appeal to the council under the rules of the Sugar Association of London.

At the trial before Sankey J. (1), and also at the trial of a similar question before Bailhache J. in the case of *Grey & Co.* v. *Tolme* (2), it appears to have been assumed that under the rules of the London

(1) 31 Times L. R. 381. (2) 31 Times L. R. 551.

Produce Clearing House and of the Sugar Association a contract was created between the parties who are put into communication with each other by the Clearing House, that is to say, in the present case between the plaintiff and the defendants Tolme & Runge. Having regard to the way in which the cases of the parties were presented before both those learned judges, the point was not treated as of importance, and what no doubt is the ordinary commercial view of the effect of the rules was accepted without investigation. In this Court, however, the point was taken that the Clearing House could not impose upon a buyer a seller who was an alien enemy, and it at once became important to ascertain what the true legal effect of the rules is.

The two purchase contracts in question in this action were dated June 12, 1914, and July 8, 1914, and were contracts for the purchase by the plaintiff of sugar described as free on board at Hamburg in accordance with the rules, regulations, and by-laws of the Sugar Association of London and of the clearing department thereof. Each contained a provision that it was subject to the regulations and conditions of the London Produce Clearing House, Limited, for sugar future delivery business, and subject to war clause as printed overleaf. The price in one case was 9*s.* $3\frac{3}{4}$*d.* per cwt. In the other the price was 9*s.* $7\frac{1}{4}$*d.* Each contract contained a clause requiring it to be registered with the London Produce Clearing House, Limited, and providing that subject to its regulations when so registered it should take effect as if the respective parties thereto had contracted with the London Produce Clearing House, Limited, instead of with each other, and upon such registration all liability of the parties to each other should cease.

The sale contract in question is dated May 1, 1914, and is upon the same form and contains the same provisions as I have already referred to. The price of the sugar was 9*s.* 7*d.* per cwt. Each of these contracts was duly registered, whereupon the novation indicated upon the face of the documents became complete, and the respective buyers and sellers ceased to be contracting parties inter se and became contracting parties with the London Produce Clearing House, Limited. The rules of the Clearing House and the Sugar Association are framed for the purpose of working off contracts so made with the Clearing House one against another, and amongst

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these rules are those numbered 19 and 20 in Part II. of the London Produce Clearing House Regulations. These rules indicate that in many cases a buyer and a seller may be put into direct communication the one with the other, as a result of which all communications relating to a particular parcel of sugar which is selected by the Clearing House to fulfil the buyer's contract pass direct between the parties so put into communication, including the payment of a price. In my opinion the true legal effect of these rules is that the parties are, when so put into communication, acting as agents only for the Clearing House Company, and that it is impossible to say that a novation is created as between parties who have contracted to buy and sell respectively at different prices, and whose duty to each other under the rules is to pay the price fixed by the company. In ordinary practice the point is, no doubt, immaterial; but as in the present appeal the question has been directly raised it is necessary to decide what the true legal relation is, and, in my opinion, no privity of contract was created by the rules as between the plaintiff and the defendants Tolme & Runge; and the question whether one of the partners in the firm of Tolme & Runge was an alien enemy is therefore immaterial.

In many cases arising under the rules the question of whether there was or was not privity of contract between the disputing parties does not seem to be material, because of the special form of the arbitration rules of the Sugar Association, which are probably framed to meet the kind of case which arises here, namely, the case of two parties being put into communication by the Clearing House Company and difficulties or disputes arising between them in relation to delivery or payment. Rule 352 provides that any dispute which may arise out of or in relation to a clearing contract or other dealing or matter contemplated by the clearing rules, and whether the members of the clearing department or the parties to the contract between whom the dispute arises are mutually contracting parties or not, shall be referred to the committee. The question in the present case, however, does not arise under rule 352, but under rule 491B, which gives a right of appeal only to a party to the contract. The contract referred to in this rule is the buyer's contract, and in the view which I take of these rules and regulations the only parties to the contract in the present case are the plaintiff

and the Clearing House Company. The defendants Tolme & Runge have therefore no right to appeal to the council, and the injunction must go against them.

With regard to the Clearing House Company they have not so far claimed or threatened to claim a right to appeal, though they have appeared in the action and supported their co-defendants in their defence. The construction of rule 491B is therefore not directly in question. But, inasmuch as so much argument has been addressed to the point, I think it is right to express my opinion upon it. In the first place I think that the object of introducing the first two lines of the rule was merely to exclude from the operation of rule 491A a case where a tender had been made against a contract. In the second place I think the word "tender" is used in the sense of a tender which complies with the rules, regardless of the question whether from some cause not dealt with by the rules the tender may be in point of law a bad tender. It is therefore unnecessary, in my opinion, to consider the effect of the embargo. In the third place I consider that the rule does not make an appeal to the council a condition precedent to the enforcing of any right under the contract. It follows that either party can take proceedings in a Court of justice to have their rights defined. Finally I consider that the rule does not operate in the same way as rule 491A does by substituting an alternative for the performance of the contract. I think it is very likely that the original framers of the rule contemplated an appeal to the council in which the council should decide what under exceptional and difficult circumstances was fair to be done between the parties. But in order to carry out that intention (if it was the intention) very different language to that employed ought, in my opinion, to have been used. The question we have to decide is not what was the intention of the original framers of the rule, but what must a party to a contract in which the rule is incorporated be taken to understand by the language used, and so understanding to agree to. In my opinion, the decision referred to in the rule must be a decision on the rights of the parties under the contract ascertained in accordance with legal principles.

Having thus arrived at a conclusion that the parties to the contract are the plaintiff and the Clearing House Company, and that rule 491B does not substitute an alternative method of performance

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to that indicated in the contract, I pass now to consider what was the position of the parties under the contract on the outbreak of the war. The position cannot be better indicated than it is in the letter of the defendants Tolme & Runge of August 29, 1914, in which they claim their right to appeal to the council. [The Lord Justice read the letter.] The impossibility of performing the contract by either party owing to the outbreak of war cannot, in my opinion, be better demonstrated than it is in this letter, and under these circumstances the plaintiff is, in my opinion, entitled to a declaration that the contract is avoided and that no appeal to the council can be made.

Appeal allowed.

Solicitors for plaintiff: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for defendants Tolme & Runge: *Cattarns, Cattarns & Harris.*

Solicitors for defendants the London Produce Clearing House, Limited: *Coward & Hawksley, Sons & Chance.*

NOTE (1).—Many of the rules of the Sugar Association of London (1914 edition) are referred to in the judgment of Swinfen Eady L.J.

It is only necessary here to set out the following :—

Rule 404: "Seller shall make a tender . . . . stating marks, numbers, the country of origin, and the time when tender is issued . . . ."

Rule 406: "The sugar so tendered must have arrived at shipping port (which in the case of Hamburg shall include Harburg or Altona), and must at the time of tender be free of all Customs formalities required prior to export."

Rule 491: "Whenever either a buyer or seller has failed to complete a contract, or the same would but for this rule be liable to be cancelled, or has failed to meet his margin liabilities, such contract shall, on the application of either party, or any third party interested, be closed by settlement at a price to be fixed by the committee, which price shall not be less than 3*d.* per cwt., nor more than 2*s.* 6*d.* per cwt., under or over the value of the sugar on the day upon which the default occurs, and then by passing pro forma invoices at their respective contract prices and re-invoicing at the closing prices . . . ."

Rule 491A: "In the event of Germany being involved in a war with either England, France, Russia, and/or Austria, this contract, unless previously closed, shall, on official notice being given that such a state of war exists, be deemed to be closed at the average quotation of the official calls held on the sixth working day counted backwards from the

day when such official notice is given, not counting the day of official notice (nor any date on which there is no official quotation to count as a working day), and accounts shall be made up with and between the contracting parties, who shall accept such settlement as complete and final; all differences arising therefrom shall be due immediately . . . ."

Rule 491B: "For the purposes of the war clause a contract against which a tender has been made shall be deemed a closed contract. Should the state of war prevent shipment or warehousing and/or passing of documents, then any party to the contract shall be entitled to appeal to the council for a decision which shall be binding on all concerned."

NOTE (2).—Regulations of the London Produce Clearing House, Limited (therein called the company), for future delivery business in beetroot sugar 88° (dated June, 1913):—

Regulation 19 (in Part II.): "Every buyer who has a contract open for the current month (even if not yet registered in the company's books) shall be bound to accept in fulfilment of the same any tender either passed on to him by the company, or made to him direct on behalf of the company by a seller duly authorised by the company to do so.

"In the case of a buyer having been indicated to a seller for the purpose of tendering, seller shall tender to such buyer direct (and inform the company without delay of his having done so), otherwise his notice of tender shall be given to the company, who may pass it on to any buyer at their option. In the latter case the company may also put the tenderer (i.e., the seller) into direct communication with the receiver (i.e., the buyer)."

Regulation 20: "In all cases where tenderer and receiver shall have been brought into direct communication with each other, all declarations, notices, the delivery of documents and payment of invoice (including charges, if any), as well as final settlement of balances of invoice, differences of weight and analyses, and allowances for torn, damp and dirty bags, shall pass between tenderer and receiver direct.

"The price at which such tender shall pass between the two parties shall be fixed by the company, and any differences between that and contract prices shall be settled with the company when documents pass.

"Both parties shall immediately inform the company of documents having passed."

W. F. B.

[IN THE COURT OF APPEAL.]

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LEVERINGTON *v.* A. DODMAN & CO., LIMITED.

March 16, 17. *Employer and Workman—Compensation—Injury to Eye—Suspensory Award—Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (16.).

A workman was injured by accident in the course of his employment by a piece of metal entering his eye. Two days after the accident the fragment was removed by his club doctor. A fortnight later his employers sent him to an eye specialist, who stated that he could see no trace of recent injury, but that there were old scars on both eyes, and that the recent injury might have healed up and left no trace. A week later the man was taken off his club by his doctor, who said that he had quite recovered and was as good a man as before the accident. The employers paid compensation in respect of two weeks' incapacity. There was no evidence of any probability of the recurrence of mischief to either eye resulting from the accident.

In an arbitration under the Workmen's Compensation Act the county court judge awarded arrears of compensation up to the date of the man's discharge from his club and made a suspensory order for the payment of a penny a week :—

Held, that it was not a proper case for a suspensory award.

Hargreave v. *Haughhead Coal Co.* [1912] A. C. 319 applied.

Appeal from an award of the judge of the Norfolk County Court holden at King's Lynn, sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant in this case was employed as an engineer in the respondents' works, his wages being 26*s.* a week. On September 4, 1915, while engaged in facing up cast-iron pipes a fragment of metal entered his right eye, causing an injury by which he was for a time totally incapacitated for work. On September 6 his club doctor extracted the fragment from the eye, and on September 16 the respondents sent him to an eye specialist, who examined him and stated in evidence that he could see no trace of recent injury to either eye from the entrance of a foreign body, but that there were old scars on both eyes which might have been there for months or years ; the alleged injury might have healed up and left no trace. The club doctor discharged the man on September 28

and said that he had quite recovered and was as good a man as before the accident. The employers recognized their liability, but paid only 24*s.* compensation. The workman having applied for an arbitration, the matter came before Judge Mulligan, who awarded 18*s.* for arrears of compensation and, without being asked to do so, made a suspensory order for payment of a penny a week.

The employers appealed, on the ground that no case had been made out for a suspensory award.

St. John Field (for *Costello*, serving with His Majesty's Forces), for the appellants. In order to justify the making of a suspensory award there must be the possibility of future incapacity arising from subsequent developments causally connected with the accident. Here the accident was trivial, and there was no evidence of permanent diminution of the man's wage-earning capacity. If in every case where a man has sustained a trivial injury to one of his eyes there must be a suspensory award there will be no finality in such proceedings: *Tynron* (*Owners of*) v. *Morgan* (1); *Griga* v. *Harelda* (*Owners*) (2); *Hargreave* v. *Haughhead Coal Co.* (3); *Hart* v. *Cory Brothers* (4); *Jones* v. *Anderson* (5); *Jackson* v. *Hunslet Engine Co.* (6)

D. N. Pritt, for the respondent. The county court judge was justified in making a suspensory award in this case.

[LORD COZENS-HARDY M.R. The question is whether there is any reasonable risk of recurrence of the incapacity.]

There was evidence upon which the county court judge could find that there was.

[PHILLIMORE L.J. Is there any case in which a suspensory award has been made where an injury has been sufficiently long healed to ensure that it will not recur?]

Hart v. *Cory Brothers.* (4)

[PHILLIMORE L.J. There the man had actually lost one eye.]

The county court judge is entitled to take the view that if there is a remote chance of recurrence of incapacity no injustice will be done by making a suspensory award, whereas if the payments are

(1) [1909] 2 K. B. 66.
(2) (1910) 3 B. W. C. C. 116.
(3) [1912] A. C. 319.
(4) Ante, p. 172.
(5) (1914) 8 B. W. C. C. 2.
(6) (1915) 8 B. W. C. C. 584.

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permanently terminated the workman will lose his right to all future compensation. The evidence does not go directly to the point whether there was or was not a chance of recurrence. At any rate, the case ought to go back to the county court judge to determine whether there ought now to be a suspensory award. It would be a hardship on the workman if the suspensory order were discharged when the question has not been argued out before the county court judge.

LORD COZENS-HARDY M.R. I think in this case, not without regret, that the order cannot stand. The applicant on September 4 met with an injury to his eye by reason of a foreign body getting into it while he was at work. It was not a serious accident. Two days afterwards, on the 6th, the foreign body was removed from the eye by the man's club doctor. Ten days after the man was seen by a specialist, to whom he was most properly sent. The specialist, having examined him, said he could not discover any trace of recent injury to either eye caused by the presence of any foreign body; he also said the injury might have healed up and left no trace; at all events, he could see no trace of it then. That was only ten days after the foreign substance, whatever it was, had been removed from the man's eye. The club doctor, Dr. Gardner, gave evidence which satisfied the learned judge, who was the only person whose satisfaction is important in a case of this kind. He said there were scars, but the man had quite recovered by the 28th and was as good a man as before the accident. As club doctor he did not allow him to go off the club till the 28th, and the learned county court judge has awarded compensation in respect of the injury up to the 28th. That was, I think, the only point which was really argued before the learned county court judge, who found in favour of the workman and awarded him 18*s.* arrears. There is no quarrel with that part of the case on the part of the applicant, who was satisfied with the award of 18*s.* arrears up to September 28. Then the learned county court judge, having apparently reserved judgment, at the end of his award says "I award 18*s.* for arrears and one penny a week, and costs." The learned judge, according to all the information before us, was not asked by anybody to make an award of a penny a week; but notwithstanding that fact, if there were circumstances which justified the suspensory award I should not be astute

to set it aside. But when I look at the evidence it seems to me there is absolutely nothing from which any inference of that kind can be drawn. It was not a serious injury to the eye. A bit of steel, or some foreign material, was removed from the eye, and ten days after its removal the eye had so healed up that the eye specialist, although there were scars on both the man's eyes, could find no evidence of recent injury at all. In truth there had been recent injury, but on September 6 according to one witness, or on September 16, according to another,—that is, less than two weeks afterwards—all injurious effects of the accident had been removed. That being so, the man himself not suggesting any recurrence or probability of recurrence, and the injury being not serious or one such as might by sympathy afterwards affect the other eye, it seems to me it would be wrong to say that the award of a penny a week ought to be continued here, unless we are prepared to go to this extent, that in every case, even where there is no reasonable probability of recurrence, we ought to keep the award alive so as to enable a subsequent application to be made. That, I think, is contrary to the principles laid down by the House of Lords in *Hargreave* v. *Haughhead Coal Co.* (1) It is also contrary to many later decisions, and it is in no way inconsistent with that class of cases in which the Court has held that where there is a rupture it is right in almost every case to make an award of a penny a week. I should be prepared in most, if not in all, cases of that kind to support an award of a penny a week, even although the man were able to do his ordinary work and earn his living, and no doctor had said there was probability of recurrence, because the possibility of recurrence is a factor to be taken into account. I cannot say that that applies to the case of a trivial injury to an eye the effects of which had been removed in ten days, or at least within less than a month. I do not think it would be right to apply the analogy of rupture cases to an injury of that kind.

I think, therefore, not without regret, that the award, so far as the penny a week is concerned, must be varied. That will not in any way interfere with the award for arrears or deprive the applicant of the costs in the Court below; and, as the appellants have failed in substance as to part of their case, there will be no costs of the appeal.

(1) [1912] A. C. 319.

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PHILLIMORE L.J. I am of the same opinion. On the pleadings every point was open at the trial, but, having regard to the admission by the applicant in his particulars that the employers had paid him up to September 18, the only matter that really had to be tried was for how much longer the employers were to pay. Upon that the contention on behalf of the applicant was that he ought to be paid until September 29, but it is just possible, by putting the most favourable construction upon his evidence, to suggest that he ought to be paid up to October 18. The respondents said that he ought not to be paid any more than they had paid him. On that issue the evidence called was the evidence of the applicant, who did not suggest that at the time when the trial took place, which was November 11, there was anything the matter with him at all. He may have intended to suggest that he had not recovered until October 18, but most probably he meant to say he had not recovered until September 29. The doctor called for the defence said that the injury was healed on September 16, when he saw the applicant. He could then see no trace of recent injury. He was not prepared to disagree with the evidence of the man himself and of the other doctor that there had been an injury, but he said, if so, the traumatic injury had passed and it was healed. He made a remark, which is of some importance with regard to this penny a week award, as to the existence of ancient scars on both eyes, not on the injured eye only, but on both eyes. Then comes the evidence of the club doctor, who said: "I discharged him from the club on September 28. I think he might have been fit for work before that, but I wanted to be on the safe side. I think he had quite recovered on the 28th and was as good a man as before the accident." The learned judge reserved his judgment, and he found, as he was entitled to do upon the evidence, that the man was incapacitated till September 29, and gave him his arrears for the disputed period and his costs of the trial which had been brought about by his employers resisting compensation for a longer period than up to the 18th. He then reserved his judgment, which was delivered, as we are told, when the parties were not present, some days later, either the 13th or the 20th, giving an award of a penny a week. I cannot find that anybody asked for it. I cannot find that it was a matter of dispute or inquiry at the time whether there was any likelihood of recurrence of the injury or

whether the injury was latent and might recur. Neither the man nor either of the doctors gave evidence to lead one to suppose that. But apparently, almost as if it were common form, the learned judge added this suspensory award of a penny a week, which is equivalent to a declaration of liability. Now such declarations of liability, or such suspensory awards, are not lightly to be made. They may do much mischief, as the House of Lords has taught us in the case of *Hargreave* v. *Haughhead Coal Co.* (1); and in this particular case I can see that there might be great danger, because the man has old scars. It may be that in the future some fresh accident may cause injury to the eye, and if that should happen the employer ought not to be put in the position of having to pay this man in respect of any such further injury not occasioned by this accident, the effects of which have all passed away. I have not been able to find any case of traumatic injury where the old wound has been healed and a suspensory award has been made. Where an eye has been lost in the sense that the sight of it has been destroyed, and there is a possible focus of disease in the eye and a possible danger of mischief by sympathy to the other eye, as the Master of the Rolls said in *Hart* v. *Cory Brothers* (2), it may be that the learned county court judge would be right in making a suspensory award. In rupture cases it is quite right to make a suspensory award, because, rightly or wrongly, the ordinary view is that a rupture occurring to a grown man is an injury which is never completely healed. It may be latent. The parts may so far recover that without extra strain the rupture may not recur; and it may be compensated for by surgical and medical appliances. But it is never entirely healed, and there is always a tendency for it to recur with a strain much less than that which would bring about a rupture in an uninjured man. That is an excellent ground for making a suspensory award. I entirely agree in the order that the Master of the Rolls proposes.

SARGANT J. I am of the same opinion. The suspensory award appears to have been made by the learned county court judge entirely on his own initiative. In my opinion that suspensory award cannot be supported, having regard to the evidence, unless the

(1) [1912] A. C. 319. (2) Ante, p. 172.

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Court is prepared to lay down as a general rule that there should be a suspensory award in every case of injury to an eye, however slight.

Solicitors: *Smiles & Co.; Wing & Eade, for Donald F. Jackson, King's Lynn.*

G. A. S.

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March 22, 23.

[IN THE COURT OF APPEAL.]

EARWICKER *v.* LONDON GRAVING DOCK COMPANY, LIMITED.

Employer and Workman—Compensation—Proceedings before Arbitrator—Question of Law raised—Duty of Judge to take a Note—Medical Assessor—Function of—Consolidated Workmen's Compensation Rules, July, 1913, r. 36.

In proceedings under the Workmen's Compensation Act, 1906, the duty of the judge under r. 36 of the Consolidated Workmen's Compensation Rules, where a question of law is raised, to make a note thereof and of the facts in evidence in relation thereto is imperative and independent of any request by the parties. He is not exempted from the performance of that duty by the fact that in any particular Court it is the practice for an official shorthand writer to attend and take a note of the proceedings, a transcript of which may be obtained by the parties on payment of the cost thereof. With the consent of the parties, however, the shorthand writer's note may be signed, certified, and adopted by the judge as his own note.

A medical referee, summoned by the judge to sit with him as assessor, is not within his functions in cross-examining witnesses and acting as advocate for one side or the other. His duty is merely to assist the judge as an expert in deciding points upon which the judge cannot be assumed to have knowledge without such assistance.

APPEAL from an award of the judge of the City of London Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant in this case was a boilermaker in the employ of the respondents, a firm of ship repairers. On November 30, 1914, while engaged in his work, he was injured by a small piece of steel which entered his right eye and ultimately destroyed the sight of it. The

respondents paid him 1*l.* a week down to September 17, 1915, when they discontinued their weekly payments on the ground that he had recovered from the accident and was able to work again. The applicant then commenced proceedings for an arbitration. The case was in the list for hearing at the City of London Court on January 10, 1916, but was not reached. On January 26, 1916, the respondents' solicitors wrote to the applicant asking him to submit himself for medical examination by their doctor. To this request the applicant made no reply. On February 1 the respondents gave notice that they intended to apply on February 4 for an order under Sched. I., par. 4, of the Act suspending the right of the applicant to continue the proceedings on the ground that he had refused to submit himself for medical examination. On February 4 the case came on for hearing, when counsel for the respondents applied for the suspension of the applicant's right to compensation on the ground that he had declined to undergo a medical examination. It appeared that he had already been medically examined several times, the last occasion being on January 5. After hearing counsel for the applicant, who asked him to go into the question whether there had been an unreasonable refusal to submit to an examination, the judge determined to proceed with the hearing.

There was evidence that the applicant as a one-eyed man was incapable of following his employment, which involved going about in dangerous and ill-lighted places in the interior of ships.

The judge found that the applicant was unfit to resume his former work and awarded him 1*l.* a week compensation during total or partial incapacity. This weekly payment represented half the difference between 1*l.* 10*s.* per week which the applicant was found to be able to earn as an injured man and the sum of 3*l.* 10*s.* per week which he earned before the accident.

The employers appealed on the grounds (1.) that the judge was wrong in law (*a*) in refusing to decide the question of the reasonableness of the applicant's refusal or neglect to submit himself for medical examination in accordance with the provision of Sched. I., par. 4, of the Act, and (*b*) in rejecting the evidence tendered by the respondents in that behalf. (2.) That the judge was wrong in law in permitting the medical assessor at the hearing to examine and cross-examine the witnesses. (3.) That there was no evidence to

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support an award of more than a declaration of liability to which the respondents had already submitted or agreed to submit.

At the hearing of the appeal it appeared that the county court judge had taken no note at all of the proceedings before him, but, in accordance with the practice in the City of London Court, a note of the evidence was taken by the shorthand writer attached to the Court. The transcript, however, did not contain any note of the submissions of counsel, and counsel did not agree in their recollections of what actually took place, it being contended on the part of the applicant that the respondents' objection had been abandoned, this being disputed by counsel for the respondents.

It further appeared that in the county court the medical assessor, who sat with the judge, was allowed by him to put a number of questions to the witnesses as to the capacity for work of a one-eyed man, and as to the value of such a man in the labour market.

Rigby Swift, K.C., and *H. Duckworth*, for the appellants. In this case there ought to be a new trial. The learned county court judge did not perform the duty imposed upon him by r. 36 of taking a note of the point of law that was raised and of the evidence in relation thereto. It is his duty to do so without any request from the parties: *Taylor* v. *Ward & Co.* (1) The ordinary practice in the county court is no doubt different, but r. 36 is precise: *Sidney* v. *W. Collins, Son & Co.* (2); *Reg.* v. *Kerr.* (3)

Again, the medical assessor at the trial altogether exceeded his functions. He examined and cross-examined the witnesses as to the capacity of a one-eyed man as if he were an advocate: *Lewis* v. *Port of London Authority* (4); *Booth* v. *Carter.* (5) There was no evidence upon which the learned judge could properly award 1*l.* a week. It is obvious that justice has not been done in this case and that there ought to be a new trial.

Shakespeare, for the respondent. There was a perfectly fair trial. When the case came on on February 4 the Court already had seisin of the matter, and the application to postpone in order to give an

(1) (1914) 7 B. W. C. C. 441.
(2) (1910) 3 B. W. C. C. 433, 435, n.
(3) (1894) 70 L. T. 595.
(4) (1914) 7 B. W. C. C. 577, 588.
5) (1915) W. C. & Ins. Rep. 59.

opportunity for further medical examination was too late. Moreover, the man had been already several times examined.

In taking no note of the case the learned judge no doubt relied on the well-known practice in the City of London Court for an official shorthand writer to take a note of all the proceedings. The medical assessor was within his rights in endeavouring to obtain information from the witnesses. The appeal should be dismissed.

March 23. LORD COZENS-HARDY M.R. This is an anxious case. The applicant some time ago met with a serious injury to one eye; compensation was paid for a considerable time, and it was then stopped because his employers thought that he was able to work again. There had been several medical examinations of the man. There were two or three examinations before the case came into the paper on January 10. The desire of the employers, however, for a further examination was made quite manifest by the letter of January 26. That was a formal letter asking for another examination, and with a view of bringing the case within par. 4 of the First Schedule the solicitors asked that the trial might be adjourned in order that there might be an examination. That application was renewed by counsel when the case came on on February 4. I think it is a fallacy to say that the Court had seisin of the case on January 10; the case was not reached, it was not part heard, and certainly I do not think that the Court was seised of the case on January 10 in any sense which is material for the purpose of to-day. It was not even called on, it was simply not reached; it went over, if I may use a colloquial expression, until the next Court day, which was February 4. When that day was reached an application was made by counsel for the respondents in the terms of the letter. Counsel for the applicant said it was too late to ask for an adjournment, because the Court had seisin of the matter, and the application ought not to be granted, but the learned judge, after apparently hearing counsel for the respondents again (though it is not clear whether he did so or not), said: "I will go on with the case and let this stand over until the end of the case and then I will see what is to be done." The case went on, the learned judge sitting with a medical assessor; it was obviously impossible to try the case without one.

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EARWICKER v. LONDON GRAVING DOCK COMPANY, LIMITED.

Lord Cozens-Hardy M.R.

What was the duty of the learned judge? As to his duty under r. 36 I decline to say one word more than I have said in previous cases; and I do not think that I can make more emphatic what I consider to be the duty of the learned judge in these cases. It has been suggested that although the learned judge took no note whatever of this case (that is what his registrar tells us), still the fact that there is an official shorthand writer in the City of London Court exempted the learned judge from that duty. I do not assent to that view. The parties may if they are so minded take the not unreasonable course of agreeing that the official shorthand writer's notes of the evidence shall be taken as accurate, giving the learned judge an opportunity of seeing the transcript and adopting it as his note. If that course is taken no objection can be raised, but it is a very serious hardship in these cases that there should be no available note or record for this Court of the evidence which was taken except upon the terms of the parties paying a very considerable sum for the shorthand writer's transcript of what took place. In the present case we are told that the cost of the transcript of the evidence alone was 4*l.* 12*s.* That is a very serious matter indeed, whereas if the learned judge had taken a reasonable note of the evidence it would have been much shorter; and the cost of taking a copy of his notes is something very trivial and unimportant, and in no sense a burden on the workman as compared with the cost of taking a transcript of the shorthand writer's notes. It is not a question of the evidence only in this case, for it is said that a question of law was raised of which there was no note, about which I certainly do not propose to express any final view. It is argued that under Sched. I., par. 4, you cannot have a compulsory examination after the Court has seisin of the case, and that the Court had seisin of the case on January 10. The learned judge did not express any opinion about that. No note was taken by the official shorthand writer to show what took place at the end of the trial. It is quite plain that in the correspondence before the case came on the employers asked for an examination under par. 4, and that counsel asked for it at the beginning of the hearing. We are invited to presume that at the end of the trial he did not persist in it, being a wise man and knowing what the medical evidence had been, and being afraid, in fact, to persist in it. There is a difference of opinion between counsel as to

what took place. What is this Court to do? With all respect to the learned judge, I think this is a case in which he has neglected the duty imposed upon him by r. 36, and has thus put upon this Court an impossible task. It is quite impossible for us to say what did take place. It is certain, I think, that the learned judge did not from first to last indicate any view whatever as to whether the application for an adjournment ought or ought not to be acceded to. He did not express any view whatever as to whether there had been unreasonable conduct by the applicant in obstructing the examination. We are therefore not in the least in a position to say whether the application was one which ought or ought not to have been acceded to. If the learned judge had heard the application and had given reasons one way or the other, it is extremely probable that we should not have interfered with his discretion, but as he has exercised no discretion in the matter, I do not see what we can do except to send the matter back for a new trial.

There is another point to which I desire to refer. The learned judge was sitting quite properly with a medical assessor. The medical assessor in this case seems to me to have taken a part which was quite outside and beyond his duties. In one of the authorities referred to, *Lewis* v. *Port of London Authority* (1), a passage was quoted from the judgment of Pickford L.J., who defined, in language which I think cannot be misunderstood, the functions and the duties of a medical assessor. He is an assessor to assist the learned judge upon points as to which his expert knowledge may render assistance; he is not there to conduct an examination or a cross-examination—I care not which you call it—of a more or less hostile character to one side or other in the case; his duty is simply and solely that of assisting the learned judge by his expert knowledge to arrive at a proper conclusion, there being points raised which the learned judge cannot be assumed to know without being aided by a medical assessor. He is not a witness, of course; he cannot be cross-examined, and he certainly ought not to take up the position of cross-examining witnesses at length; and he ought not to take up the case as if he were leading counsel for one side or the other. Upon that ground also I think that this trial was very unsatisfactory, and it seems to me that all we can do is to say with

(1) 7 B. W. C. C. 577, 588.

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regret that there must be a new trial of this case because it was not properly tried.

PHILLIMORE L.J. I agree with what the Master of the Rolls has said upon both points.

As regards the first matter there was a question of law raised under the First Schedule to the Act, par. 4, which says that a workman shall if so required submit himself to an examination by a duly qualified medical practitioner, and if he refuses or obstructs the same his right to take or prosecute any proceeding shall be suspended until such examination has taken place. The Courts have put a construction on the word "obstruct" which is quite reasonable, and there are cases in which an employer may require a workman to be examined or further examined, and the workman may refuse, and the Court may or may not hold that he has improperly refused or that he has obstructed, but it then becomes a question for the decision of the learned judge or arbitrator who hears the matter, whose discretion, if he properly exercises it, is not likely to be successfully impugned. Here there is no doubt that towards the end of January the employers applied by letter and in February by a notice that the workman should submit himself to a further examination. There is no doubt he had been examined, and when the hearing took place on February 4 counsel for the employers took this preliminary point and asked that the man should be further examined by one of their doctors, and that either the case should be adjourned or that the final decision should be left open until that examination had taken place; to which answer was made by counsel for the workman in substance that this was a very unreasonable application, that the man had been examined at no very distant date, and it was wrong to take advantage of the fact that the case had not been reached on the day it was put down for hearing, to wit, January 10, but had been necessarily postponed and agreed to be postponed to February 10 in order to try to put in force this paragraph in the schedule. Speaking for myself, I think that it was a reasonable point to urge before the learned judge as a reason why he should decide the question left to him under par. 4 in favour of the workman, but if put as a kind of estoppel that the learned judge could not require it because the parties had waited until after the date when the case was first in the list for hearing, I

do not think the point was a good one. I do not think the learned judge could say "This is so late that I have no jurisdiction to entertain the point." He might have said "This application is made so late that for that and other reasons I do not think it is one to which I should accede." However, what we do know is that the learned judge, after hearing counsel for the employers and counsel for the workman in answer and counsel for the employers in reply, said, "I will go on with the case; anyhow I can go on with the whole case and leave this point open until the end." What happened at the end, and how far what happened at the end can be elucidated by the final speech of counsel for the employers, is unfortunately a matter upon which we have no accurate knowledge. Counsel before us were present at the trial in the county court; as I understand, the recollection of one is that he still insisted on his point that there ought to be this examination; the recollection of the other is, not that he formally withdrew it, but that by not insisting on it he was legitimately taken to have dropped it. That being the case, and we being in difficulty as to what did happen, we are deprived of that source of information which would have been conclusive and which the Legislature has intended that we should have. Under r. 36 it is the duty of the arbitrator or of the learned judge to take a note of any question of law raised and of the facts in evidence in relation thereto and of his decision thereon. That rule differs, as has been pointed out, from the general rule regulating county court procedure under which the duty of the learned judge to take a note does not arise until the party before him has requested him to take a note of the material evidence and of the point of law and of his decision thereupon. Under r. 36 he has to do it without request, and this Court has so held—indeed it was necessary for the Court so to hold—under the direct words of the rule. Now the learned judge has taken no note. Application has been made to him, and through the registrar he says he has taken none. That is prima facie a contravention of the rule, but it is said that by custom in the City of London Court, and at the expense of the City up to a point, there is a paid shorthand writer who takes notes and whose notes are available to the parties upon their paying the cost of a transcript. That is not a burden which except by consent can be put upon the parties. I do not understand that the City pays for the cost of a transcript;

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Phillimore L.J.

indeed it would be unreasonable to expect that it should. There was no note taken here by the county court judge. It is suggested that so settled is the practice in the City of London Court that everybody is to be taken to have understood it, but I think it would be unwise to trust to that. But assuming that a shorthand writer's note signed and certified by the learned judge may, by consent of the parties, be substituted for and be deemed a sufficient compliance with r. 36, we find that the note in this case is deficient on the very points which have to be determined by us. There is no note of the speeches of either counsel at the end. It is apparent from the shorthand writer's note that Mr. Duckworth did address the Court; it is not quite so apparent that Mr. Shakespeare did. Mr. Duckworth states he did, and I understand Mr. Shakespeare does not wish to be understood to contradict him. There is no record of what was said, and we are left with this: At the end of the cross-examination of the last witness for the defence an observation by the learned judge is reported; then these words appear: "Mr. Duckworth addressed the Court"; and then this follows, which it is agreed was said by the Court, although I do not know that the shorthand writer's note shows that it was: "He is not fit to go back as a charge hand. I think he is entitled to 1*l.* a week as compensation"; and then there was a discussion about costs. With regard to the question whether this point of law was maintained—or I will put it in another way, whether the point of law which had been taken was waived—the record is entirely silent. What we do know, because both counsel take the same view, is that the learned judge passed no opinion upon it at all. We do know from the note presented to us that he reserved it to the end, and it is common ground that he said nothing about it at the end. That being the case, we really must have this matter properly tried and properly recorded. The learned judge not having passed his opinion upon this matter, we have no sufficient reason to suppose that he was relieved from doing so, and it being something which he ought to have passed his opinion upon, upon that ground alone the case ought to go back for a new trial.

Then it was said by Mr. Shakespeare—and I do not want to disregard the argument—"If you will allow me to read the official shorthand writer's notes of the medical evidence you will see that the respondents could not have the face to ask for this adjournment

after what came out." I do not see the force of that. I have glanced at the evidence, I have not properly read it through, but I have taken in Mr. Shakespeare's favour that which he has argued, that the hospital doctor for the employers had examined the man on January 5 and had taken a view unfavourable to the employers, and when called as a witness expressed a view unfavourable to the employers. I assume all that. From one point of view that is all the more reason why the employers should wish, if they had to go into Court to fight with that doctor's evidence before them, as long before as January 5, to have a further examination which they think may displace even the opinion of the hospital doctor whom they have employed, and whom, having nobody else to call, they called. Therefore, giving due weight to that argument, I see no sufficient reason why there should not be a new trial.

With regard to the other matter, I do not want to be understood to put within too narrow bounds the way in which the medical assessor should be allowed to elicit information which ought to be before the Court and upon which ultimately he may have to advise his principal, the learned judge. It is enough to say that he was allowed by the learned judge in this case to take an undue share in the trial and to usurp duties which were not his.

SARGANT J. I am also of opinion that this case should go back for a new trial, and I will add but a few words.

As regards the duty of the learned judge to take a note, it seems to me that these arbitrations constitute some of the most important business that comes before the county courts, and r. 36 of the Rules, which have statutory effect, was deliberately made an imperative rule and in no way dependent upon the request of one of the parties. Secondly, with regard to the important question of fact, whether there was a withdrawal by Mr. Duckworth of his application for the suspension of the right to compensation, I think I ought to say this. Counsel have very properly, in the absence of any shorthand note of the whole of what took place, declined to contradict each other, or to commit themselves to statements which might be not in accordance with the recollection of the opposing counsel. But there are two circumstances which seem to me extremely important: in the first place had the application once been properly made, it seems to me

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that the onus lies on him who alleges that it was withdrawn or waived; and in the second place I attach great importance to the fact that Mr. Duckworth, while the matter was still fresh in his mind, only a few days after the trial had taken place—I think seven days after the date of the trial—in his notice of appeal raised this very point. It seems to me that that confirms his recollection on the point rather than that of Mr. Shakespeare.

Solicitors for appellants: *W. Carpenter & Son.*
Solicitors for respondent: *Lewis Barnes, Drake & Nicholson.*

G. A. S.

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March 14, 31.

[IN THE COURT OF APPEAL.]

BEDFORD *v.* COWTAN & SONS, LIMITED.

Employer and Workman — Industrial Disease — Compensation—Certifying Surgeon—Contradiction—Appeal—Certificate final—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 8, *sub-s.* 1 (*f*)—*Reg.* 8 *of Regulations of June* 21, 1907, *amended in* 1908 *and* 1910.

J. H. Bedford was a painter employed by Cowtan & Sons, Limited, and he claimed compensation from them for incapacity caused by lead poisoning contracted by him whilst in their service in 1914. He consulted Dr. Bond, a certifying surgeon under the Factory and Workshop Act, 1901, who on March 31, 1915, gave a certificate that the applicant was suffering from lead poisoning and its sequelae and was thereby disabled from earning full wages; that the disablement commenced on February 27, 1915; and that the leading symptoms of the disease were tremors in the arms and hands. There was no appeal to a medical referee. At the hearing of the arbitration Dr. Bond gave evidence confirming his certificate, and he was supported by another doctor. The employers called two doctors who had seen the claimant in June, 1915, and they gave evidence that he was not suffering from lead poisoning, but from "Parkinson's disease," which was not an "industrial disease" within the Act. It was suggested that it was open to them to prove that this was so since the date of the certificate, but they admitted in cross-examination that the applicant had been suffering from the same disease throughout, so that in effect their evidence was that the certificate was wrong and ought to be disregarded:—

Held (dissentiente Phillimore L.J.), that the only appeal from the certificate was to a medical referee as provided by s. 8, sub-s. 1 (*f*), and that in the absence of such an appeal the correctness of the

certificate could not be disputed; the applicant was therefore entitled to compensation.

Held, *per* Phillimore L.J., that the certificate was only conclusive of the fact that the applicant had lead poisoning at its date, March 31 and backwards to February 27, but not forwards.

APPEAL from an award of the judge of the Bloomsbury County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The following statement of facts is taken from the judgment of Phillimore L.J. :—

The applicant was a painter in the employ of the respondents. He claimed to be suffering from an industrial disease, namely, lead poisoning. He obtained the necessary certificate, dated March 31, 1915, to the effect that he was suffering from lead poisoning and had been since February 27, 1915. And this, as the employers did not appeal within seven days, became unquestionable. But the employers, acting as we are told under the directions of the company with whom they are insured, refused to admit liability. So these proceedings were taken.

The applicant put his case thus: "We beg to give you notice on behalf of Mr. Joseph Henry Bedford, of 35, Cumberland Market, N.W., that he has obtained a certificate from the certifying surgeon dated the 31st ultimo that he was disabled on the 27th of February by reason of lead poisoning which he contracted whilst in your employ, and we claim on his behalf compensation at the rate of 1*l.* a week from the date of his disablement until he is able to resume work."

The employers in their answer made the following point: "That the said applicant is not at the present time suffering from lead poisoning and its sequelae."

The county court judge made his award in the following terms: "I find that the applicant has been since February 27 and still is suffering from the disease mentioned in the certificate of Dr. Bond dated March 31 and that by reason thereof he has been and still is totally incapable of work. I find that the disease was and is due to the nature of the applicant's employment by the respondents from July to October, 1914, being a period within the twelve months previous to the date of disablement and the applicant

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having been unemployed subsequent to such employment." From this the employers appeal.

At the hearing, which took place on September 29, the doctor who gave the certificate was called and said that his certificate was true. He did not give any evidence of further examination, but he said that the applicant, who was present, still showed the same symptoms. He was cross-examined (under protest by the applicant's counsel) with a view to its being shown that the applicant was not suffering from lead poisoning, but from a non-industrial disease called " Parkinson's disease," or " paralysis agitans." He said it was not so. A second doctor was called for the applicant who had examined him on September 21, 1915, and who said he was then suffering from lead poisoning, and who was cross-examined in the same way.

Then for the employers two doctors were called who had examined the applicant on June 17 and 30, 1915, and saw him also in Court, and who said that then and now he was not suffering from lead poisoning, but from " Parkinson's disease." In their examination-in-chief they confined themselves to the time when they had examined the applicant, but on being pressed in cross-examination they said they did not believe that he had had lead poisoning on February 27 or March 31. It had in their view always been a case of " Parkinson's disease."

The county court judge gave careful reasons in writing for his award, and from them I extract the following passages : " If the question were open I could not say that I was satisfied that the applicant's incapacity was due to lead poisoning, but I have to consider the effect of the certificate of the certifying surgeon. It is admitted for the respondents that the certificate is conclusive that the disease from which the applicant was suffering from February 27 to the date of the certificate (and even perhaps to June when respondents' doctors first saw him) was lead poisoning. But it is said that it is open to them to show that the disease and the incapacity due to that disease had ceased by the month of June. This is no doubt so, but they do not show it. Their doctors' evidence was that there was no recovery from lead poisoning—he had never suffered from lead poisoning ; if the doctors were right the certificate was and must be wrong. Under these circumstances it appears

to me that the disease from which the applicant was suffering in June and subsequently being on the respondents' doctors' evidence the same disease as that from which he was suffering in March, and that disease being, as I must take it, lead poisoning, I must find that the applicant has been suffering from lead poisoning throughout."

The employers appealed on the grounds that the learned county court judge misdirected himself in holding (1.) that they must show that the applicant had ceased by June, or alternatively at the date of the hearing, to suffer from lead poisoning, and that it was sufficient if they showed that the applicant in June, or alternatively at the date of the hearing, was not in fact suffering from lead poisoning; (2.) that as the judge was unable to say on the evidence that the applicant's incapacity in June, or alternatively at the date of the hearing, was due to lead poisoning, he was wrong in law in finding that the applicant was still suffering from the disease mentioned in Dr. Bond's certificate of March 31, 1915, and that by reason thereof he was totally incapable of work; (3.) that the judge was wrong in holding that because of the certificate he was bound to disregard the evidence tendered to him at the hearing on behalf of the employers and to hold that in law the applicant was still suffering from lead poisoning in June, or alternatively at the date of the hearing; (4.) that there was no evidence on which the finding that the applicant was at the hearing suffering from any disease due to the nature of his employment by the employers could be supported. Alternatively, that as the judge was not satisfied that the applicant's incapacity in June or at the date of the hearing was due to lead poisoning, he misdirected himself in finding that the applicant was at the hearing suffering from any disease due to the nature of the applicant's employment by them from July to October, 1914.

C. Herbert Smith, for the appellants. The question is what is the effect of a certificate given by a certifying surgeon that a workman is suffering from an industrial disease. By s. 8, sub-s. 1, of the Act of 1906 it is provided that where a certificate is given to that effect the workman shall be entitled to compensation as if the disease were a personal injury by accident. Lead poisoning is one

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of the industrial diseases included in the Third Schedule to the Act, and Parkinson's disease is not; and it is submitted that it is open to the appellants to prove that the certificate is wrong and that the workman was not suffering from an industrial disease at any time. At all events it may be shown that he was not so suffering after June 17, 1915, and therefore is not within the section. The onus of proof is on the applicant to show that the disease was due to the employment—*Chuter* v. *J. J. Ford & Sons* (1) and *Dean* v. *Rubian Art Pottery* (2)—and he has not proved it: *Haylett* v. *Vigor & Co.* (3) He had left his work a long time before the disablement. We are not called upon to dispute the validity of the certificate altogether. At all events we have proved that he is not suffering from lead poisoning now, so his compensation should cease from the date of the hearing. It is said that the certificate is conclusive, and that the only appeal therefrom is to a medical referee, whose decision shall be final: s. 8, sub-s. 1 (*f*); but on some points it is not final: *Garrett* v. *Waddell & Son.* (4)

Harold Morris, for the applicant. The evidence of the appellants' medical witnesses was inadmissible. A claim cannot be made in respect of an industrial disease without a certificate. Sect. 8, sub-s. 2, does not affect this case: *Chuter* v. *J. J. Ford & Sons.* (1) The certificate is final. If once the Court is bound by the certificate to hold that there has been such a "personal injury by accident" as sub-s. 1 speaks of, it cannot admit evidence to alter that decision. The only remedy is to go to a medical referee, and he can only allow or dismiss the appeal: *Jones* v. *Ebbw Vale Steel, Iron and Coal Co.* (5) The judge has found as a fact that the disease was caused by the employment.

C. Herbert Smith in reply referred to *Timpson* v. *John Mowlem & Co.* (6)

Cur. adv. vult.

March 31. LORD COZENS-HARDY M.R. This appeal raises an important question under s. 8 of the Act. The applicant is a painter employed by the respondents. He applied to a certifying

(1) [1915] 2 K. B. 113.
(2) [1914] 2 K. B. 213.
(3) [1908] 2 K. B. 837.
(4) (1911) 5 B. W. C. C. 507.
(5) (1910) 3 B. W. C. C. 181.
(6) (1915) W. C. & Ins. Rep. 219.

surgeon, Dr. Bond, who on March 31, 1915, gave a certificate that he was disabled on February 27 by reason of lead poisoning which he contracted while in the employment of the respondents and that the leading symptoms of the disease were tremors in arms and hands. The employers had notice of this on April 1, 1915. A right of appeal is given either to the workman or to the employer, under s. 8, sub-s. 1 (*f*), to a medical referee, whose decision is to be final, but no appeal was made within the time limited by the regulations. The employers were not satisfied that the certificate was correct, and two doctors, who examined the applicant in June, advised that the disease from which the man was suffering was not lead poisoning, but what is known as Parkinson's disease. An application for an award was made on July 31. At the hearing Dr. Bond adhered to the view stated in his certificate, and he was supported by the evidence of another doctor. On the other hand, two doctors, who examined the man in July, gave evidence that he never had been suffering and was not then suffering from lead poisoning. I should add that Parkinson's disease is not a scheduled disease to which s. 8 has any application. The learned judge made an award in favour of the workman, basing his judgment upon the certificate, and stating that if he had been at liberty to consider merely the evidence of witnesses brought before him he might have arrived at a different conclusion.

It is necessary to consider somewhat carefully the provisions of s. 8. A workman cannot take proceedings under s. 8 unless he has obtained a certificate either from the certifying surgeon or, on appeal, from the medical referee. The obtaining of such a certificate is a condition precedent to his right to apply for compensation. He is not bound to produce any evidence other than the certificate. There must, however, be evidence to satisfy the arbitrator that the disease, that is to say, the certified disease, is due to the nature of the man's employment, and that the disablement continues. There are provisions in the case of there being several employers in the past twelve months, which are not relevant to the present appeal. The statute having given one appeal, namely, to a medical referee, and only one appeal, it seems to me to be clear that it is not open to any Court to question that certificate. It is said, however, that, notwithstanding the certificate, it is open

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to the employer to challenge the certificate as inaccurate by calling evidence directed to that point. In my opinion this is directly contrary to the object of the Act and to the language used in the Act. It is of course open to the employer to prove that the certified disease from which the man was suffering, and by which he was disabled at the date of the certificate, has since ceased, and that such disablement as now exists is due to some other cause. In other words, he may show that a new cause has come into operation, but that is all he can do. Now in the present case the evidence of the employers' witnesses went to this point—the man's condition of total disablement was the same as it was at the date of the certificate, and they did not suggest any change since that date, but they said that the doctor who gave the certificate was mistaken, and is now mistaken, in the evidence which he has given in this Court. When once it has appeared from the evidence of all the doctors that the disease from which the man is suffering at the date of the hearing is the same disease as that from which he was suffering at the date of the certificate, it seems to me logically to follow that this is merely an indirect mode of appealing against the certificate contrary to the express provisions of the statute. This, in substance, is the view which was taken by the learned judge, and in my opinion he was right, and I think the appeal should be dismissed.

PHILLIMORE L.J. stated the facts as set out above and continued: In the ordinary course of a claim under the Act the applicant first proves an injury from an accident arising out of and in the course of his employment. It then becomes a question whether the injury has lasted sufficiently long (i.e., at least a week), whether it is still continuing, and if so whether likely to be permanent, and so forth.

In an industrial disease case where no punctum temporis can be assigned for the first accruer of misfortune to the applicant there is substituted for proof of an accident, and an injury therefrom, a certificate from the certifying surgeon appointed under the Factory and Workshop Act, which also mentions the date when the misfortune accrued or is to be deemed to have accrued; and on these points the medical certificate is conclusive (s. 8, sub-s. 1).

As to the misfortune having arisen out of and in the course of his employment with the employers against whom the applicant

claims, there are provisions as to prima facie proof which do not concern the point before us (sub-s. 2). The rest of the procedure follows the same line as in the case of an injury by accident.

The applicant might have to show that the disease had lasted a week. If he wants compensation up to a particular past date, he would show that the disease was lasting till then. If he wants compensation up to the hearing and in future, he must show that the disease is continuing and likely to last. In most cases I fear that these diseases are progressive. But it is not always so, and therefore these points may arise.

The employers raised the point precisely in their answer. They did not, it is true, make it as plain in their answer as they did at the hearing in the county court, and as their counsel did before us, that as they could not set aside the certificate they had to accept the position that the applicant must be deemed to have had lead poisoning on March 31 and from February 27 at least to June 17, when their doctor first examined, and pay up to that date. But though they did not make this so plain, it is the point taken in the answer: "The applicant is not now suffering from lead poisoning." And this was at any rate an issue which the county court judge had to determine, as I think he says.

It is true that the doctors, who said that the applicant had not lead poisoning now, could be and were driven to say logically that in their opinion he never had had it. But this did not, I think, conclude the county court judge from deciding the very truth on the issue I have mentioned.

The case was conducted in rather a strange way. The certifying doctor was called as a witness and asked if his certificate was true. This exposed him at once to cross-examination, though the applicant's counsel protested against it. I should have thought it was unnecessary to call him for this purpose. His certificate would have done of itself. If then he or any other doctor were called (as in this case) to prove that the man was still suffering, it seems obvious that on this point any doctor so testifying must be open to cross-examination, and to contradiction.

The objection to this view of the effect of a certificate is, I suppose, that it makes the certificate worth so little. It is conclusive but for so short a period. The certificate is the condition precedent.

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Phillimore L.J.

It takes the place of accident and injury and of proof of accident and injury. When it has done this it has done its work. It is final and conclusive up to this point, but no further. If the later investigation of the county court judge lead him to the conclusion that it was wrongly given it cannot be helped. The party who has got it remains entitled to the benefit which it gave him, which was to enable him to launch his case. But there is no reason for giving him any further advantage, unless, indeed, it be this. The onus probandi may be shifted. "The presumption of a continuance of a state of things once shown to exist" (Taylor on Evidence, s. 196, p. 191 of 10th ed.) may be applied in favour of the applicant.

We discussed this presumption in its relation to disease and health in *Jefferson* v. *Paskell*. (1) If this be so, the certificate provides the statutory equivalent to an accident and an injury, and also evidence of the continuance of the injury till proof to the contrary.

It would be, I think, right for the county court judge to throw the burden of proving the present non-existence of the industrial disease upon the employers. I have considered whether this is the effect of his judgment, and whether, therefore, it may not stand as it is. But I think not. He has not set himself to decide the facts with the assistance of a burden of proof thrown upon the employers. He has held himself precluded from deciding the facts according to their very truth.

The decision in the Scotch case of *Garrett* v. *Waddell & Son* (2) has been very helpful to me in coming to my present conclusion; and the importance which we in *Chuter* v. *J. J. Ford & Sons* (3) attached to the date to be put upon the certificate points in the same direction. It is true that this date is also wanted for the twelve months period: s. 8, sub-s. 1 (iii.) (*c*). But in that particular case, as I read it, there was no importance in that period.

It is said that the certificate is final and conclusive. So it is for what it certifies, namely, that the applicant had lead poisoning at its date, March 31, and backwards to February 27, but not forwards.

The argument may be put in another way. The evidence of

(1) Ante, pp. 57, 67, 71, 74. (2) 5 B. W. C. C. 507.
(3) [1915] 2 K. B. 113.

the doctors for the employers that the man had not at the date of the hearing the disease of lead poisoning must be admissible. That upon cross-examination they are driven to say that the certificate must have been wrong goes to the weight of their evidence, but does not render evidence which was admissible inadmissible. Their evidence must still be weighed and considered. Derivative or argumentative estoppel is not admitted in our jurisprudence.

In *Reg.* v. *Hutchings* (1), if the actual decision is not in point, Lord Selborne re-stated and re-affirmed two passages of Knight Bruce V.-C.'s judgment in *Barrs* v. *Jackson* (2), one being a quotation from De Grey C.J. in his advice to the House of Lords in the *Duchess of Kingston's Case.* (3) De Grey C.J. said (4): "But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." Then Knight Bruce V.-C. says for himself, after giving several illustrations (some of them, I think, pertinent to the present case) (5): "But it is, I think, to be collected, that the rule against re-agitating matter adjudicated is subject generally to this restriction—that however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object." The certificate cannot be put higher than a judgment. If there had been an appeal to the medical referee (s. 8, sub-s. 1 (*f*)) his decision would have been an award.

Then the next case I am about to quote seems in point. In *Newall* v. *Elliot* (6) proceedings for infringement of a patent, the

(1) (1881) 6 Q. B. D. 300, 304.
(2) (1842) 1 Y. & C. Ch. 585.
(3) (1776) 2 Sm. L. C., 12th ed., p. 754.
(4) Ibid. p. 755.
(5) 1 Y. & C. Ch. 597, 598.
(6) (1863) 1 H. & C. 797.

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validity of which was in question, were referred to an arbitrator, who awarded that the patent was not illegal and void, and, being then so required, stated a case for the opinion of the Court of Common Pleas, who decided to the same effect. In an action for a further infringement, the defendant disputed the validity of the patent, and the plaintiff replied by setting out the award. On demurrer counsel said "the replications merely disclose matter arising inferentially from the award." He was then stopped, and during the argument of counsel for the plaintiff the following observations were made. Wilde B. said (1): "This action is not in respect of the same matter upon which the arbitrator made his award; and it is only by inference that the award can be made a decision upon the points now in dispute." Martin B. said (2): "Assuming that, in order to arrive at the conclusion which the arbitrator has come to in favour of the patent, it must necessarily be inferred that he decided the points now in dispute between the plaintiff and defendant, still that is not such a decision as to render the award an estoppel within the rule laid down in Com. Dig., tit. 'Estoppel' (E. 4) . . . . The passage in Co. Lit. 352b is precisely in point:—'Every estoppel, because it concludeth a man to acknowledge the truth, must be certain to every intent, and not to be taken by argument or inference.'" And without any formal judgment the Court allowed the demurrer. *Cleverley* v. *Gas Light and Coke Co.* (3) also seems to me in point. There the workman met with an injury by an accident by reason of which he asserted that certain tumours in his neck broke out. The employers admitted liability and a memorandum of agreement was registered, which has the force of a judgment, under which they were to pay him so much a week as long as the incapacity lasted. The incapacity produced by the tumours lasted till his death, and he was paid accordingly. At his death the dependants claimed and the employers resisted. The county court judge received evidence as to the cause of the tumours, and believed that they were not due to the accident but to an obscure disease, but held the employers estopped by the memorandum and their continuous payments thereunder. This Court thought otherwise; and the House of Lords confirmed the decision.

(1) 1 H. & C. 801. (2) 1 H. & C. 802.
(3) (1907) 24 Times L. R. 93.

For my part I think that the award should stand so far as it orders compensation to June 17, but that as to all further claim the matter should go back to the county court judge to reconsider his decision upon the lines which I have stated.

SARGANT J. This is an appeal of the employers against an award in favour of a workman under s. 8 of the Workmen's Compensation Act, 1906. It raises a most important general question as to the binding character of the certificate of a certifying surgeon under sub-s. 1, sub-head 1 (*f*), of that section.

At the hearing the workman, who was a painter in the employ of the appellants, produced a certificate of the certifying surgeon, Dr. Bond, which was dated March 31, 1915, and which certified that the workman was suffering from lead poisoning and its sequelae, that he was thereby disabled from earning full wages at the work at which he had been employed, and that the disablement commenced on February 27, 1915. The workman also proved—and indeed on this point the evidence on both sides was in agreement—that the disease from which he had been suffering, and as to which Dr. Bond had certified, was still continuing and that it had caused and continued to cause total disablement. The learned county court judge also found as a fact that the workman's disease of lead poisoning as certified was due to the nature of the workman's employment by the employers from July to October, 1914.

At first sight, therefore, the workman would appear to have established the existence of the conditions precedent necessary to establish his right to compensation under s. 8 of the Act, as if the disablement by the disease had been a personal injury by accident arising out of and in the course of his employment and happening at the date of disablement, that is to say, on February 27, 1915. But the employers attempted to meet this case by cross-examining the workman's medical witnesses and calling fresh medical evidence to prove, not that the disease had ceased or been mitigated, a circumstance that would have affected the quantum of compensation but not the right to some compensation, but that the disease had throughout been a different disease from lead poisoning, namely, a disease known as Parkinson's disease. This evidence was objected to by the workman, but apparently received by the judge de bene

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esse ; and the result is thus stated in his judgment, namely, " If the question were open I could not say that the applicant's incapacity was due to lead poisoning, but I have to consider the effect of the certificate of the certifying surgeon." The learned judge then went on to deal with this point and came to the conclusion that he was bound by the certificate. The question here is whether that conclusion is right.

The first point to be noticed is that on the clear language of s. 8, sub-s. 1 (*f*), the condition precedent thereby constituted is not the existence of the facts certified by the certificate, but the existence of the certificate itself. This is in my judgment vital and goes to the root of the interpretation of the section. The result so far is that the certificate is in itself and by itself conclusive, and that the accuracy of its statutory contents is not in point. But the matter does not rest here. By s. 8, sub-s. 1 (*f*), a special tribunal is constituted to review the action of the certifying surgeon in giving or refusing a certificate, such tribunal consisting of a medical referee acting in accordance with rules to be made by the Secretary of State ; and it is expressly enacted that the decision of this medical referee is to be final. It seems to me that the obvious meaning of this legislation is to exclude in these cases from the consideration of the arbitrator the difficult medical questions that may arise as to the exact nature of a disease, and to refer these questions completely and finally to the decision of a professional tribunal. One reason for this may no doubt have been to avoid in the interests both of employers and workmen, and particularly of the latter, the expense and uncertainty incident to the employment of eminent experts as witnesses. But whatever the reason, there can, in my judgment, be little, if any, doubt as to the scheme of the legislation.

Now what the appellants are claiming to do here would in my view involve giving the go-by to the whole of these provisions as to a special medical tribunal, and allow employers in every case to raise the question of the nature of the disease before the county court judge. It is said, indeed, in this case that this is not so, because the appellants submit to pay compensation as from February 27, 1915, down to some later date, such as June 17, 1915, when their doctors first examined the workman, on the footing that the workman must be deemed to have been suffering from lead poisoning down to

that later date. But I can see no logical consistency in this view. No one says that the disease has changed. If the disease was not lead poisoning, and the certificate is not conclusive on the arbitrator, then the workman never had any right to compensation at all as for a statutory injury by accident. If the certificate is conclusive, then the workman is entitled while the disease lasts. The county court judge had in my opinion to decide on the same principles and with regard to the same materials for both periods. I cannot find anything in the statute which gives an interim, and not a final, efficacy to the certificate. If its effect is conclusive, it seems to me conclusive as from the first. If it raises only a prima facie presumption, then, when that presumption is displaced, it must be displaced as from the first.

It is not unimportant to observe that, in the converse case of the certifying surgeon, or the medical referee on appeal from him, refusing a certificate, it could hardly be contended that the workman could succeed before the arbitrator in a claim based on a statutory accident by industrial disease by showing that the certifying surgeon or medical referee had made a mistake and that the workman was in fact disabled by an industrial disease. But, if the real facts cannot be gone into again in this case, why should they be when the workman has succeeded in obtaining his certificate ?

In my judgment, therefore, the learned county court judge was right in holding himself bound by the certificate ; in considering that the only questions left open to him were whether the disease from which the workman had been suffering and as to which Dr. Bond had certified was caused by the employment and whether it still continued ; and in declining to consider the larger question whether the applicant's disease was in fact the industrial disease of lead poisoning. The inclination of this tribunal, as of any other, is of course to get at the real facts of any case if possible. But this inclination must give way to any sufficient statutory indication that the facts are to be decided by some other tribunal and that the finding of that tribunal is to be binding. Subsequent facts or fuller knowledge may show that the conclusion of that tribunal was wrong or, as in this case, doubtful. But the same might be the case with a decision of the county court judge himself, or any appellate tribunal. And such a decision, when once the time for appeal has

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expired, cannot be reopened merely on the ground of doubt or even of error.

I agree with the Master of the Rolls that the appeal should be dismissed.

Appeal dismissed.

Solicitors for employers : *Hair & Co.*

Solicitors for applicant : *Shaen, Roscoe, Massey & Co.*

H. C. R.

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April 10, 11, 18.

LENDON *v.* KEEN AND ANOTHER.

Arbitration—Agricultural Holdings Act, 1908—*Award set aside—Technical Misconduct of Arbitrator—Liability of Arbitrator for Costs—County Court (Agricultural Holdings) Rules,* 1909, *Order* XL., *r.* 4, *sub-rr.* 1, 14.

Order XL., r. 4, sub-r. 1, of the County Court (Agricultural Holdings) Rules, 1909, which provides, inter alia, that on an application under the Agricultural Holdings Act, 1908, for an order setting aside an award on the ground of the arbitrator's misconduct the arbitrator shall be made a party, is not ultra vires.

If an arbitrator acting under the Agricultural Holdings Act, 1908, on being served with notice of motion to set aside his award, appears and takes part in the proceedings, he thereby makes himself one of the active parties and he may be ordered to pay costs. Further, if he has been guilty of such collusion as would entitle one of the parties to bring an action against him, and his award is set aside on the ground of misconduct of that kind, costs may and ought to be given against him whether he appears in the proceedings in the county court or not.

A county court judge set aside an award made under the Agricultural Holdings Act, 1908, on the ground of technical misconduct on the part of the arbitrator, and ordered the arbitrator to pay the applicant's costs. The arbitrator had been subpœnaed by both parties to the arbitration, and he appeared in the county court but took no active part in the proceedings, nor did he endeavour to uphold his award. No suggestion was made of dishonesty or want of bona fides on his part :—

Held, that in those circumstances the county court judge was not entitled to order the arbitrator to pay the costs.

APPEAL from Exeter County Court.

The following statement of facts is taken from the judgment :—

Miss Lendon (hereinafter called " the landlord ") had let a farm to Mr. Keen (hereinafter called " the tenant "). At the conclusion

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of the tenancy disputes arose between the parties, and Mr. Hussey (hereinafter called "the arbitrator") was appointed under the Second Schedule of the Agricultural Holdings Act, 1908, to act as arbitrator. He sat to hear the parties and made his award. The landlord was dissatisfied, alleging that, although she had applied to the arbitrator under par. 10 of the Second Schedule of the Act to specify the amount awarded in respect of unreasonable disturbance of the tenant, the arbitrator had improperly refused or neglected to do so. She accordingly took proceedings under par. 13 of the schedule to get the award set aside upon the ground that the arbitrator had misconducted himself.

Rules have been made to govern proceedings under the Agricultural Holdings Act and are contained in Order XL. of the County Court (Agricultural Holdings) Rules, 1909, the material rule being r. 4, sub-rr. 1 and 14 (1); and s. 44, sub-s. 1, of the Agricultural Holdings Act, 1908, provides that "the costs of proceedings in the county court under this Act shall be in the discretion of the Court."

The matter came on for hearing on March 6, 1916, when the landlord and the tenant both appeared, as also did the arbitrator, who had been subpœnaed by both sides. As a result the judge

(1) County Court (Agricultural Holdings) Rules, 1909, Order XL., r. 4, sub-r. 1: "When application is made to the Court under the said Act [i.e., the Agricultural Holdings Act, 1908] for the removal of an arbitrator on the ground of his misconduct, or for an order setting aside an award on the ground of misconduct of the arbitrator, or on the ground that the arbitration or award has been improperly procured, the party making the application shall be called 'the applicant'; and all other parties to the arbitration, and the arbitrator, shall be made parties to the application, and shall be called 'the respondents.'"

Sub-r. 14: "Subject to the special provisions of this rule, the procedure on an application shall be the same as the procedure in an action commenced in the Court by plaint and summons in the ordinary way, and determined by the judge without a jury; and the statutory provisions and rules for the time being in force relating to such actions shall, with the necessary modifications, apply to such application accordingly; and in the application of such provisions and rules the application shall be deemed to be a summons with particulars annexed, the day fixed for proceeding with the application shall be deemed to be the return day, and the applicant and respondents shall be deemed to be plaintiff and defendants respectively."

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found that the landlord had in fact applied to the arbitrator to separate the figures, and the arbitrator had not done so. No suggestion was made imputing anything in the nature of dishonesty or bad faith to the arbitrator. The most that was suggested against him was that he had been guilty of technical misconduct.

The judge, in addition to an order referring the award back to the arbitrator, ordered the arbitrator to pay the landlord's costs, and from this part of the order the arbitrator appealed.

Hawke, K.C. (*Rayner Goddard* with him), for the arbitrator. Sect. 164 of the County Courts Act, 1888, enables the Lord Chancellor to appoint five judges as a Rule Committee who may frame rules and orders for regulating the practice of the county courts, and it is provided that "such power of making rules and orders shall extend to all matters of procedure or practice, or relating to or concerning the effect or operation in law of any procedure or practice, in any case within the cognizance of county courts, as to which rules of the Supreme Court have been or might lawfully be made for cases within the cognizance of the High Court of Justice." Purporting to act under this power the Rule Committee have made Order XL., r. 4, sub-r. 1, but that sub-rule, so far as it makes the arbitrator a "party" to the application for setting aside his award, is ultra vires as going beyond matters of procedure or practice. To make an arbitrator a "party," and, as such, liable for costs, completely alters his position; instead of being a quasi-judicial person he is put in the position of a litigant. "Practice," like "procedure," denotes "the mode of proceeding by which a legal right is enforced": per Lush L.J. in *Poyser* v. *Minors.* (1) New rights or liabilities cannot be created under a power to frame rules dealing with procedure or practice, and to make an arbitrator a "party" is to give a new right to the applicant and to impose upon the arbitrator a liability not authorized by s. 164 of the County Courts Act, 1888. [He cited *Attorney-General* v. *Sillem* (2), *Wetherfield* v. *Nelson* (3), *Williams* v. *Goose* (4), and *Guaranty Trust Co. of New York* v. *Hannay & Co.* (5)]

(1) (1881) 7 Q. B. D. 329, 333.
(2) (1864) 10 H. L. C. 704.
(3) (1869) L. R. 4 C. P. 571.
(4) [1897] 1 Q. B. 471.
(5) [1915] 2 K. B. 536.

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Even assuming, however, that the rule is intra vires and that the arbitrator can competently be made a "party," it nevertheless does not confer any jurisdiction upon the county court judge to make an order on the arbitrator to pay the costs of the application to have his award set aside, especially where, as in the present case, no suggestion is made that the arbitrator was acting otherwise than bona fide. [*Williams* v. *Wallis and Cox* (1) and *Lord Ashburton* v. *Gray* (2) were also referred to.]

Dummett, for the landlord. Rule 4, sub-r. 1, of Order XL. is not ultra vires. The rule is clearly dealing with a matter of procedure and practice. Where charges are made against an arbitrator's conduct of the arbitration it is to his advantage to come before the Court so that he can deal with the charges. If the rule is intra vires the question of costs is in the discretion of the county court judge: see s. 113 of the County Courts Act, 1888, and s. 44, sub-s. 1, of the Agricultural Holdings Act, 1908; and in this case there was ample material upon which he was entitled to exercise his discretion in the way he did, for, to use Atkin J.'s expression in *Williams* v. *Wallis and Cox* (1), there clearly was "a mishandling of the arbitration" by the arbitrator.

J. L. Pratt, for the tenant. Rule 4, sub-r. 1, is intra vires and the arbitrator is a party to the proceeding in every sense. If he is not a party, he is not entitled to appeal; his remedy would be by prohibition.

Hawke, K.C., replied.

Cur. adv. vult.

April 18. The judgment of the COURT (Atkin and Sankey JJ.) was read by

SANKEY J., who, after stating the facts set out above, continued as follows: Two points were taken on behalf of the appellant—first, that the rules under which the arbitrator was made a party and ordered to pay the costs were ultra vires, and, secondly, that in any event, the arbitrator not having been guilty of any moral turpitude or any dishonesty, the judge could not, or ought not, in his discretion to have awarded costs against him.

As to the first point, the rules in question appear to have been made under s. 164 of the County Courts Act, 1888, whereby a Rule Committee of County Court Judges appointed by the Lord Chancellor

(1) [1914] 2 K. B. 478. (2) Ante, p. 452.

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may, as therein provided, make rules and orders extending to all matters of procedure or practice or relating to or concerning the effect or operation in law of any procedure and practice in any case within the cognizance of county courts, as to which rules of the Supreme Court have been or might lawfully be made in cases within the cognizance of the High Court. It was alleged that a rule under which an arbitrator was added as a party to litigation could not be said to be a rule of practice and procedure, and a number of cases were cited to us on the point.

We think that the best statement of the law is that by Lush L.J. in the case of *Poyser* v. *Minors* (1), where he says: "'Practice' in its larger sense—the sense in which it was obviously used in that Act, like 'procedure' which is used in the Judicature Acts, denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the Court is to administer the machinery as distinguished from its product." It was contended that these words show that new rights and new liabilities cannot be created under a power confined to practice and procedure, and that adding an arbitrator as a party was to give a new right to the applicant and to impose a new liability on the arbitrator. We do not think that this is correct. It appears to us that the object of the Agricultural Holdings Act, 1908, was to give the county court jurisdiction not only over landlord and tenant in such cases, but over the arbitrator as well. Power is given under par. 6 of the above-mentioned Second Schedule to remove an arbitrator who has misconducted himself. Under par. 13 power is given to set aside an award where the arbitrator has misconducted himself, or an arbitration or award has been improperly procured. Cases are to be found in the books where, in the High Court, an arbitrator has been made party to proceedings to set aside an award: see *In re Whiteley and Roberts' Arbitration* (2); and where the Court, in a case with reference to the sale of goods, appointed an umpire on an originating summons to which the purchasers had made the arbitrators respondents but had not joined the vendors as parties: see *Taylor* v. *Denny, Mott & Dickson.* (3)

(1) 7 Q. B. D. 329, 333. (2) [1891] 1 Ch. 558.
(3) [1912] A. C. 666.

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Having regard to these powers we do not think it is possible to say that the Rule Committee of County Court Judges has no jurisdiction to make such rules as r. 4, sub-rr. 1 and 14, of Order XL., under which an arbitrator is added as a party where proceedings are being taken to set aside his award on the ground of misconduct, or that such a rule is anything other than practice and procedure in respect of which the Committee has jurisdiction to make rules under s. 164 above referred to. To hold the opposite might in some cases inflict great hardships upon an arbitrator. He might, for example, be accused of dishonesty in making an award. The matter would come before the county court in his own neighbourhood, and he would not be able to take any steps in his own defence, or to show that the allegation against him was unfounded.

We think, as Lord Haldane said in *Taylor's Case* (1), that the Act was intended to create a statutory jurisdiction of its own of the most elastic kind and was meant to enable the Court to get before it anybody whom it might be proper to bring before it. We are therefore of opinion that the rule in question is not ultra vires.

There seems to us to be no objection to a rule which makes it necessary to add the arbitrator as a party to a proceeding to set aside an award for misconduct or to remove the arbitrator, nor to a provision which makes the arbitrator in such a proceeding a defendant in an action. It does not follow, however, that such a rule can create new rights and liabilities in respect of such arbitrator other than such as flow from mere procedure, and this distinction must be observed in dealing with the next question which has to be considered, namely, the question of the costs of or against the arbitrator.

As to the second point, namely, that the learned county court judge could not or ought not in his discretion to have awarded costs against the arbitrator, we are of opinion that it is necessary to bear in mind the position of an arbitrator in law. He is in a quasi-judicial position, and as long as he is not guilty of any collusive conduct with one of the parties no action can be brought against him for mere incompetence to apply either the facts or the law applicable to the case before him.

Starting with this principle, and bearing in mind the County Court Rules above referred to, we are of opinion that the jurisdiction

(1) [1912] A. C. 666.

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with regard to awarding costs against an arbitrator under such circumstances ought to be exercised in manner following: If the arbitrator on being served with notice of motion to set aside his award appears and takes part in the litigation, by so doing he makes himself one of the active parties of the case and costs can be given against him. Again, if the arbitrator has been guilty of such collusion as would entitle one of the parties to bring an action against him, and his award is set aside on the ground of misconduct of this sort, we think that costs can and ought to be given against him, whether he appears in the county court or not. We expressly leave open other cases of dishonesty on the part of the arbitrator. A rule, however, which purported to make an arbitrator liable for costs where he has acted honestly but made a mistake would be imposing a new liability and going beyond practice and procedure.

Applying these considerations to the facts of this case, we think that the arbitrator did not take any active part in the litigation or endeavour to uphold his award; in fact he was subpœnaed by both sides and was represented by a solicitor. Further, it is admitted that there is no question of want of bona fides or of dishonesty against him. We are therefore of opinion that the judge could not and ought not to have awarded costs against him, and that the appeal should be allowed.

The order we propose to make is as follows: Set aside so much of the order in the county court as made the arbitrator pay the costs. Order that the landlord's costs in the county court be paid by the tenant, who endeavoured to uphold the award which the county court judge referred back. Order that the arbitrator's costs of this appeal be paid by the landlord and the tenant.

Appeal allowed.

Solicitors for arbitrator: *Torr & Co., for Roberts & Andrew, Exeter.*

Solicitors for landlord: *Mann & Crimp, for Hutchings & Kennaway, Teignmouth.*

Solicitors for tenant: *Arnold Carter & Co., for Dunn & Baker, Exeter.*

J. S. H.

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The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1916, will be as follows:—

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[1916] 1 Ch. [1916] 2 Ch.

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The appellant, an inspector under the Sale of Food and Drugs Acts, asked for, and was supplied by the respondents with, a shillingsworth of "preserved cream." On analysis this was found to be cream with which boric acid had been mixed. "Preserved cream," that is to say, a mixture of cream and boric acid, is sold as a well-known commodity, but it was found that cream containing boric acid in any quantity is injurious to health, more particularly in the case of children and of invalids:—

Held, that although the article was sold as a mixed article, namely, "preserved cream," the respondents had, within the meaning of s. 3 of the Sale of Food and Drugs Act, 1875, sold an article of food, namely, cream, with which an ingredient, namely, boric acid, had been mixed which rendered the cream injurious to health, and therefore that they were liable to the penalty imposed by that section.

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An information in the nature of a quo warranto will lie at the instance of a private relator against a member of the Privy Council whose appointment is alleged to be invalid.

The respondents, who were born abroad of foreign parents, became naturalized British subjects in 1892 and 1878, and were made members of the Privy Council in 1909 and 1902, respectively:—

Held, that the effect of the Naturalization Act, 1870, was to render the respondents, after their naturalization, capable of being members of the Privy Council, and that sub-s. 2 of s. 3 of the British Nationality and Status of Aliens Act, 1914, has not revived in the case of a naturalized alien the disqualification for membership of the Privy Council contained in s. 3 of the Act of Settlement. REX *v.* SPEYER. REX *v.* CASSEL - - - - - **Div. Ct. 595**

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An alien enemy may be sued for breach of contract in the King's Courts as well where the cause of action accrued after the outbreak of war as where it accrued before the war began.

An alien enemy defendant cannot issue a third party notice under Order XVI., r. 48, the effect of such a notice being to initiate an independent proceeding in which the defendant is the actor. HALSEY *v.* LOWENFELD. LEIGH AND CURZON, THIRD PARTIES - **Ridley J. 143**

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2. —— *Contract—Implied Basis of—Tenancy of House—Tenant an Alien Enemy—Aliens Restriction Order—Tenant prohibited from residing in District—Liability for Rent.*

The plaintiffs before the outbreak of the war let to the defendant, an Austrian subject, a residential flat at W. for a term of years. By the terms of the agreement the defendant was not to assign or underlet the premises without the lessors' licence, such licence not to be unreasonably withheld. On war breaking out the defendant became an alien enemy. By an Order in Council alien enemies were prohibited from residing within certain specified areas, including W.

In an action to recover rent accrued due in respect of the flat since the date of the Order :—

Held, that it was not the basis of the contract of tenancy that the defendant should continue to be allowed by law to inhabit the flat in person ; that the Order consequently had not the effect of extinguishing the tenancy ; and that the defendant was liable for the rent. LONDON AND NORTHERN ESTATES CO. *v.* SCHLESINGER - - - - - **Div. Ct. 20**

3. —— *Interned Non-naturalized German Subject—Contract entered into after Declaration of War with Germany—Right to enforce.*

A contract between a German subject resident and carrying on business in England and a British subject also residing and carrying on business in England, entered into after the outbreak of war between Great Britain and Germany and being one in no way prohibited by any Proclamation against trading with the enemy, is not affected by the fact that the German subject subsequently becomes interned within the realm as a civilian prisoner of war ; and the German subject is entitled to maintain any action otherwise competent to him in respect thereof.

The internment of a registered alien enemy does not operate as a revocation of the licence to remain in this country which is implied in registration.

Dictum of Low J. in *Rex* v. *Superintendent of Vine Street Police Station, Ex parte Liebmann* [1916] 1 K. B. 268, overruled. SCHAFFENIUS *v.* GOLDBERG - - - - - - **C. A. 284**

4. —— *Partner—Outbreak of War—Dissolution of Partnership—Legal Proceedings against Enemies Act*, 1915 (5 *Geo.* 5, *c.* 36).

A partnership between a British subject and a German subject, the latter being resident in Germany, in a business carried on in England, the continuance of which during war between England and Germany would involve intercourse with the enemy, is dissolved by, and at the date of, the outbreak of war between those countries. The provisions of the Partnership Act, 1890, as to the winding up of a partnership are in that case inapplicable. The German partner is entitled to have his interest in the partnership at the date of the dissolution valued, including his share of the goodwill, if any, and to be paid the amount thereof when payment becomes legally possible ; and he has an equitable lien on the partnership assets for the amount due to him. If the English partner continues to carry on the business after the date of the commencement of the war, the German partner is not entitled to a share of the profits of the business earned after that date. HUGH STEVENSON & SONS, LIMITED *v.* AKTIENGESELLSCHAFT FÜR CARTONNAGEN-INDUSTRIE **Atkin J. 763**

5. —— *Prisoner of War—Loss of German Nationality—Continuous Residence out of Germany for Ten Years—Habeas Corpus.*

A person who was a German subject by birth but who has resided continuously out of Germany for more than ten years but has acquired no other nationality and is subject to certain disabilities under the North German statute of June 1, 1870, and the German Imperial and State Nationality Law of July 22, 1913, has not entirely lost his nationality of origin and is therefore an alien enemy. *Ex parte* WEBER **C. A. 280, n.**

6. —— *Prisoner of War—Non-combatant—Prerogative of Crown to imprison—Jurisdiction of Court of King's Bench to interfere with Exercise of Prerogative—Writ of Habeas Corpus.*

A German subject who has obtained his discharge from German nationality but has not become a naturalized British subject is, under the provisions of the German law, in a privileged position and does not become entirely divested of the rights belonging to a natural-born German. He is therefore an alien enemy.

Ex parte Weber [1916] 1 K. B. 280, note, followed.

The Crown is entitled in the exercise of its prerogative to imprison an alien enemy, and the King's Bench Division has no jurisdiction to interfere with the exercise of the prerogative. An alien enemy resident in the United Kingdom, who, in the opinion of the Executive Government, is a person hostile to the welfare of this country and is on that account interned, may properly be described as a prisoner of war although not a combatant or a spy ; and an application by him for a writ of habeas corpus will be refused. REX *v.* VINE STREET POLICE STATION SUPERINTENDENT. *Ex parte* LIEBMANN - - - - - - - **Div. Ct. 268**

ALIENS RESTRICTION ORDER - - 20
See ALIEN ENEMY. 2.

APPEAL—Court of Criminal Appeal - - **443**
See CRIMINAL LAW. 1.

2. —— *Order in Chambers—Order appointing Arbitrator—Submission to Arbitration disputed—Matter of Practice and Procedure—Rules of the Supreme Court*, 1883, *Order* LIV., *r.* 23.

A contract for the sale of goods stated that in all disputes that might arise out of it all the parties expressly agreed to submit the same to arbitration. The contract was signed by the purchasers. The vendors purported to sell through the agency of brokers, and the contract was signed by the brokers "by the authority of our principals as agents." A dispute arose out of the contract owing to non-delivery of the goods or some of them. The purchasers called

APPEAL—*continued.*
upon the brokers to appoint an arbitrator. The brokers refused to do so on the ground that they as mere agents were not parties to the submission to arbitration.

On the application of the purchasers an order was made by a district registrar for the appointment of an arbitrator. On appeal to a judge at chambers that order was discharged. The purchasers appealed to a Divisional Court:—

Held, that, as there was no cause or matter pending in the High Court, the appeal was not in a matter of practice and procedure within the meaning of Order LIV., r. 23, of the Rules of the Supreme Court, and therefore that the appeal lay to a Divisional Court and not to the Court of Appeal.

In re Colman and Watson [1908] 1 K. B. 47 distinguished.

In re Portland Urban Council and Tilley [1896] 2 Q. B. 98 and *In re Frere and Staveley Taylor & Co. and North Shore Mill Co.* [1905] 1 K. B. 366 discussed. MILLER, GIBB & Co. *v.* SMITH & TYRER, LIMITED - **Div. Ct. 419**

APPEARANCE — Workmen's compensation — Infant—Service irregular—Waiver by appearance - - - - - **85**
See WORKMEN'S COMPENSATION. 7.

ARBITRATION — *Agricultural Holdings Act*, 1908—*Costs—Award set aside—Technical Misconduct of Arbitrator—Liability of Arbitrator for Costs—County Court (Agricultural Holdings) Rules*, 1909, *Order* XL., *r.* 4, *sub-rr.* 1, 14.

Order XL., r. 4, sub-r. 1, of the County Court (Agricultural Holdings) Rules, 1909, which provides, inter alia, that on an application under the Agricultural Holdings Act, 1908, for an order setting aside an award on the ground of the arbitrator's misconduct the arbitrator shall be made a party, is not ultra vires.

If an arbitrator acting under the Agricultural Holdings Act, 1908, on being served with notice of motion to set aside his award, appears and takes part in the proceedings, he thereby makes himself one of the active parties and he may be ordered to pay costs. Further, if he has been guilty of such collusion as would entitle one of the parties to bring an action against him, and his award is set aside on the ground of misconduct of that kind, costs may and ought to be given against him, whether he appears in the proceedings in the county court or not.

A county court judge set aside an award made under the Agricultural Holdings Act, 1908, on the ground of technical misconduct on the part of the arbitrator, and ordered the arbitrator to pay the applicant's costs. The arbitrator had been subpœnaed by both parties to the arbitration, and he appeared in the county court but took no active part in the proceedings, nor did he endeavour to uphold his award. No suggestion was made of dishonesty or want of bona fides on his part:—

Held, that in those circumstances the county court judge was not entitled to order the arbitrator to pay the costs. LENDON *v.* KEEN **Div. Ct. 994**

ARBITRATION—*continued.*

2. —— *Agricultural Holdings Act*, 1908 (8 *Edw.* 7, *c.* 28), *s.* 13, *sub-ss.* 1, 4; *Second Schedule*, *r.* 13—*Costs—Discretion of Arbitrator.*

In an arbitration under the Agricultural Holdings Act, 1908, the arbitrator may in his discretion direct the successful party to pay the costs of the arbitration. LORD ASHBURTON *v.* GRAY - - - - - - **Div. Ct. 452**

—— Order appointing arbitrator—Appeal **419**
See APPEAL. 2.

ARRANGEMENT, DEED OF - - - **382**
See BANKRUPTCY. 2.

AUTREFOIS CONVICT, PLEA OF - - **443**
See CRIMINAL LAW. 1.

AWARD.
See ARBITRATION and WORKMEN'S COMPENSATION.

BANKRUPTCY—*Costs, Taxation of—Payment—Adjudication annulled—Debtor's Application to reopen Taxation—Discretion of Court.*

A bankrupt obtained the annulment of his adjudication on providing for the payment of his debts in full. He then applied to reopen the taxation of the bill of costs of the trustee's solicitor, which had been taxed and paid more than two years previously, on the grounds (1.) that it had been taxed on a wrong principle; (2.) that items had been allowed for work done before the committee of inspection had authorized the work; and (3.) that items had been allowed for work wholly unauthorized:—

Held, that, although the Court might in the exercise of its discretion reopen a taxation in a proper case, no special reason was shown for reopening a taxation that had taken place at a time when the bankrupt had no interest whatever in the administration of his estate in bankruptcy.

The application was therefore refused. *In re* YEATMAN - - - - **Horridge J. 461**

2. —— *Deed of Arrangement—Validity—Execution by Person authorized by Power of Attorney—Affidavit verifying Execution—Assent of Majority of Creditors in Number—Creditors for Sums not exceeding* 10*l.*—*Registration of Power of Attorney as Deed of Arrangement—Application by Debtor for Declaration that Deed of Arrangement void—Jurisdiction of Court—Conduct of Debtor preventing him from relying on Invalidity of Deed—Deeds of Arrangement Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 47), *ss.* 1, 3, 5, 23.

By s. 23 of the Deeds of Arrangement Act, 1914, "Any application . . . . by the debtor . . . . for the enforcement of the trusts or the determination of questions under" a deed of arrangement for the benefit of the debtor's creditors generally "shall be made to the Court having jurisdiction in bankruptcy in the district in which the debtor resided or carried on business at the date of the execution of the deed":—

Held by the Court of Appeal (reversing the

BANKRUPTCY—*continued.*

decision of the Divisional Court), that an application by the debtor for a declaration that a deed of arrangement was void, upon the ground that it did not comply with the provisions of the Act, was not an application for the enforcement of the trusts or the determination of questions "under" it, and therefore a county court judge having jurisdiction in bankruptcy had no jurisdiction to entertain the application.

A debtor gave his sister a power of attorney authorizing her to execute a deed of arrangement for the benefit of his creditors and to make any affidavit necessary for registering the deed. The deed was accordingly executed by her as his attorney under the power, and she also made the affidavit required by s. 5, sub-s. 1, to be made "by the debtor" on the registration of the deed stating the total estimated amount of property and liabilities included under the deed and the names and addresses of the creditors. There were ninety-six creditors in all, of whom sixty-eight were for sums over 10*l.*; twenty-five of the sixty-eight did not assent to the deed within the time required by the Act; forty-three with debts over 10*l.* and twenty-eight with debts under 10*l.* assented. The debtor escaped bankruptcy proceedings by reason of the execution of the deed and afterwards recognized it and concurred in the trustee acting under it. He subsequently made an application for a declaration that the deed was void. No creditor was made a party to the application, it being addressed to the trustee of the deed alone:—

Held by the Divisional Court—(1.) that execution of the deed by the debtor personally was not necessary and that it could be executed by the donee of the power of attorney given by the debtor for that purpose; (2.) that the affidavit required by s. 5, sub-s. 1, could not be made by the donee of the power, but must be sworn by the debtor personally, and that the deed was therefore void under s. 2 of the Act for non-registration; (3.) that the deed had received the assent of the majority of creditors in number within the meaning of sub-s. 5 of s. 3 of the Act, inasmuch as for the purpose of the section creditors whose debts amount to sums not exceeding 10*l.* are not to be reckoned either in calculating the total number of creditors or the majority in number; (4.) that inasmuch as the creditors did not, under the power of attorney, gain any control over the debtor's property or business, it was not in itself a deed of arrangement within the meaning of s. 1, sub-s. 2 (*e*), of the Act, which required registration in order to be valid; (5.) (*per* Horridge J.) that the debtor had by his conduct prevented himself from relying upon the invalidity of the deed; (*per* Rowlatt J.) that the Court would not in the absence of the creditors make an order declaring that the deed was void. *In re* WILSON - - - **C. A. 382**

BETTING—*Game of Skill played for Money*—*Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *s.* 1.

By s. 1 of the Betting Act, 1853, it is made an offence if any of the persons therein specified use premises "for the purpose of any money . . . . being received" by such persons "as or for the consideration for any . . . . promise

BETTING—*continued.*

. . . . to give thereafter any money or valuable thing on any event or contingency of or relating to any . . . . game."

A contingency is not the less within the section because it relates to a game which affords scope for skill and is not a game of pure chance.

Whether in the case of such a game the real consideration for the money deposited by the player is the opportunity of exercising his skill or the chance of winning the promised reward is in each case a question of fact. If the former, the game is not within the section; if the latter, it is.

The owner of an automatic machine kept it in a shop for the purpose of persons resorting to the shop playing with it in the following manner: The player placed a halfpenny in a slot which set mechanism in motion, whereby a ball was released from the top of the machine and found its way downwards through a number of projecting pins. Below the pins was a bar with a small receptacle attached, which could be manipulated by the player across the face of the machine, the object of the player being to catch the ball in the receptacle. If he succeeded, the machine automatically ejected a check which could be exchanged in the shop for two-penny-worth of sweets. The game afforded some scope for the exercise of skill, but on the average the players, who were mainly boys, were successful in winning a check only once in every eight attempts:—

Held by Ridley and Avory JJ., Lush J. dissenting, (1.) that the fact of the game not amounting to what in ordinary parlance would be called a betting transaction did not prevent the use of the premises for the purposes of the game from being an offence within the above section; (2.) that on the above facts there was evidence on which a magistrate could find that the real consideration for which the halfpenny was paid by the players was the chance of winning sweets and not merely the opportunity of exercising their skill. PEERS *v.* CALDWELL. TAYLOR *v.* CALDWELL - - **Div. Ct. 371**

BILL OF LADING—Shipping.
See SHIPPING.

BISHOP—Churchwarden—Declaration - **466**
See ECCLESIASTICAL LAW.

BOND — Principal and surety — Bond for due performance of contract — Litigation between parties to contract—Contractor ordered to pay costs — Liability of surety - - - - - - **25**
See PRINCIPAL AND SURETY.

BONUS—Crew of fishing vessel—Bonus on value of catch - - - - - **166**
See WORKMEN'S COMPENSATION. 9.

BORIC ACID—Sale of "preserved cream"—Cream mixed with - - - **878**
See ADULTERATION.

BREACH OF PROMISE—Marriage—Illness of plaintiff at date fixed for marriage—Defence of illness - - - **57**
See MARRIAGE. 2.

BUILDINGS—Local government.
See LOCAL GOVERNMENT.

BY-LAWS—Local government.
See LOCAL GOVERNMENT.

CARRIAGE — Licence — Expiration of period allowed for paying duty—Person summoned for keeping carriage on day within that period - - - **710**
See REVENUE. 1.

CARRIER—*Furniture Remover—Whether liable as an Insurer—Person exercising a Public Employment.*

The plaintiff employed the defendant, a furniture remover, to remove his furniture from one town to another. The defendant never carried furniture for a customer without first giving an estimate. Accordingly he went to the plaintiff's house and, having inspected the furniture, agreed upon the price of the removal. Beyond fixing the price nothing was said as to the terms of the removal. While the goods were in course of carriage on the defendant's lorry, a fire broke out among them whereby they were damaged. The fire was not the result of any negligence on the part of the defendant. It was admitted that the defendant was not a common carrier, but the plaintiff claimed to recover the amount of his loss upon the ground that the defendant in carrying the goods was a person exercising a public employment, and as such impliedly took upon himself the liability of a common carrier :—

Held, that upon the above facts there was no evidence upon which it could be found that the defendant had taken upon himself that liability.

Livér Alkali Co. v. *Johnson* (1874) L. R. 9 Ex. 338 commented on. WATKINS *v.* COTTELL **Div. Ct. 10**

"CARRY ON HIS BUSINESS" - - - **759**
See COUNTY COURT. 2.

CASES :—

—— *Adamson* v. *Newcastle Steamship Freight Insurance Association* (1879) 4 Q. B. D. 462.
Referred to. CAPEL *v.* SOULIDI **[1916] 1 K. B. 439**

—— *Alexander* v. *Jenkins* [1892] 1 Q. B. 797, 801.
Referred to. JONES *v.* JONES **C. A. [1916] 1 K. B. 351**

—— *Andrew Millar & Co.* v. *Taylor & Co.* [1915] W. N. 116.
Reversed - **C. A. [1916] 1 K. B. 402**

—— *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* [1915] 2 K. B. 379.
Affirmed - **C. A. [1916] 1 K. B. 495**

—— *Ayre* v. *Craven* - (1834) 2 Ad. & E. 2
Referred to. JONES *v.* JONES **C. A. [1916] 1 K. B. 351**

—— *Babcock & Wilcox* v. *Pearson* (1913) 6 B. W. C. C. 841.
Distinguished. MADDEN *v.* GUEST'S EXECUTORS - **C. A. [1916] 1 K. B. 76**

CASES—*continued.*

—— *Bagley, In re* - - [1911] 1 K. B. 317
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—— *Bank of Montreal* v. *Cameron* (1877) 2 Q. B. D. 536.
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—— *Barker* v. *Hodgson* - (1814) 3 M. & S. 267
Referred to. ANDREW MILLAR & CO. *v.* TAYLOR & CO. **C. A. [1916] 1 K. B 402**

—— *Barry's Trusts, In re* [1906] 1 Ch. 768; [1906] 2 Ch. 358.
Followed. BLOUNT *v.* BLOUNT **[1916] 1 K. B. 230**

—— *Bensley* v. *Bignold* - (1822) 5 B. & Al. 335
Referred to. LOUGHER *v.* MOLYNEUX **[1916] 1 K. B. 718**

—— *Best* v. *Loit* - (1661) 1 Roll. Abr. 59
Referred to. JONES *v.* JONES **C. A. [1916] 1 K. B. 351**

—— *Blakey* v. *Harrison* - [1915] 3 K. B. 258
Distinguished. THOMPSON *v.* DAVISON **Div. Ct. [1916] 1 K. B. 917**

—— *Bond* v. *Plumb* - [1894] 1 Q. B. 169
Referred to. PEERS *v.* CALDWELL **Div. Ct. [1916] 1 K. B. 371**

—— *Bonnard* v. *Dott* - - [1906] 1 Ch. 740
Referred to. LOUGHER *v.* MOLYNEUX **[1916] 1 K. B. 718**

—— *Bracchi* v. *Rees* - (1915) 79 J. P. 479
Referred to. PEERS *v.* CALDWELL **Div. Ct. [1916] 1 K. B. 371**

—— *Braemount Steamship Co.* v. *Weir & Co.* (1910) 15 Com. Cas. 101.
Referred to. ADMIRAL SHIPPING CO. *v.* WEIDNER, HOPKINS & CO. **[1916] 1 K. B. 429**

—— *Breull, Ex parte* - (1880) 16 Ch. D. 484
Referred to. CAIN *v.* BUTLER **Div. Ct. [1916] 1 K. B. 759**

—— *Brown* v. *Turner, Brightman & Co.* [1912] A. C. 12.
Reasoning in, applied. ADMIRAL SHIPPING CO. *v.* WEIDNER, HOPKINS & CO. **[1916] 1 K. B. 429**
Referred to. MODERN TRANSPORT CO. *v.* DUNERIC STEAMSHIP CO. **[1916] 1 K. B. 726**

—— *Burman* v. *Zodiac Steam Fishing Co.* [1914] 3 K. B. 1039.
Distinguished. NEWSTEAD *v.* LABRADOR (OWNERS) **C. A. [1916] 1 K. B. 166**

—— *Butterley Co.* v. *New Hucknall Colliery Co.* [1910] A. C. 381.
Applied. JONES *v.* CONSOLIDATED ANTHRACITE COLLIERIES, LD., AND LORD DYNEVOR - **[1916] 1 K. B. 123**

—— *Carne* v. *Brice* (1840) 7 M. & W. 183, 187
Referred to. PEAKE *v.* CARTER **C. A. [1916] 1 K. B. 652, 656**

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—— *Civil Service Co-operative Society* v. *General Steam Navigation Co.* [1903] 2 K. B. 756, 765.
Rule stated by Lord Halsbury in, applied. HIGGINS *v.* L. HIGGINS & Co. - - **C. A. [1916] 1 K. B. 640**

—— *Clifford* v. *Inland Revenue Commrs.* [1896] 2 Q. B. 187.
Referred to. UNDERGROUND ELECTRIC RYS. CO. OF LONDON AND OTHERS *v.* INLAND REV. COMMRS. - - **C. A. [1916] 1 K. B. 306**

—— *Colman and Watson, In re* [1908] 1 K. B. 47.
Distinguished. MILLER, GIBB & Co. *v.* SMITH & TYRER, LD.
Div. Ct. [1916] 1 K. B. 419

—— *Coltman, In re* - - (1881) 19 Ch. D. 64
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[1916] 1 K. B. 718

—— *Cooper* v. *Whittingham* (1880) 15 Ch. D. 501.
Referred to. LORD ASHBURTON *v.* GRAY - **Div. Ct. [1916] 1 K. B. 452**

—— *Cope* v. *Rowlands* - (1836) 2 M. & W. 149
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[1916] 1 K. B. 718

—— *Costello* v. *Pigeon* (*Owners*) [1913] A. C. 407.
Distinguished. NEWSTEAD *v.* LABRADOR (OWNERS)
C. A. [1916] 1 K. B. 166

—— *Cox* v. *Burbidge* (1863) 13 C. B. (N.S.) 430
Applied. HEATH'S GARAGE, LD. *v.* HODGES - - **[1916] 1 K. B. 206**

—— *Critchell* v. *London and South Western Ry. Co.* [1907] 1 K. B. 860.
Distinguished. J. R. MUNDY, LD. *v.* LONDON COUNTY COUNCIL
[1916] 1 K. B. 159

—— *Cullen* v. *McNair* - (1908) 99 L. T. 358
Observations of Darling J. in, not followed. HAIGH *v.* AERATED BREAD Co. - - **Div. Ct. [1916] 1 K. B. 878**

—— *Dakin (H.) & Co.* v. *Lee* (1915) 84 L. J. (K.B.) 894.
Affirmed - **C. A. [1916] 1 K. B. 566**

—— *Daly* v. *Webb* - (1869) Ir. R. 4 C. L. 309
Followed. WILLIAMS *v.* ALLEN
[1916] 1 K. B. 425

—— *Dauncey* v. *Holloway* [1901] 2 K. B. 441, 447, 448.
Referred to. JONES *v.* JONES
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—— *Davis* v. *Garrett* - (1830) 6 Bing. 716
Followed. MORRISON & Co. *v.* SHAW, SAVILL AND ALBION CO.
[1916] 1 K. B. 747, 758

—— *Denny, Mott & Dickson* v. *Standard Export Lumber Co.* [1912] 2 K. B. 542.
Referred to. MILLER, GIBB & Co. *v.* SMITH & TYRER, LD.
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—— *Derbyshire* v. *John Hetherington & Sons* (1914) 7 B. W. C. C. 677.
Referred to. HIGGINS *v.* L. HIGGINS & Co. - **C. A. [1916] 1 K. B. 640**

—— *Dibb* v. *Brooke & Sons* [1894] 2 Q. B. 338
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—— *Don Brothers, Buist & Co.* v. *Scottish Insurance Commrs.*, 1913 S. C. 607.
Distinguished. REX *v.* WILBERFORCE. *Ex parte* NATIONAL INS. COMMRS.
[1916] 1 K. B. 239

—— *Doyley* v. *Roberts* (1837) 3 Bing. N. C. 835
Referred to. JONES *v.* JONES
C. A. [1916] 1 K. B. 351

—— *Duncan, In re* - [1892] 1 Q. B. 331, 879
Referred to. *In re* YEATMAN
[1916] 1 K. B. 461

—— *East London Waterworks Co.* v. *Leyton Sewer Authority* (1871) L. R. 6 Q. B. 669, 673.
Distinguished. MERSEY DOCKS AND HARBOUR BOARD *v.* BIRKENHEAD CORPORATION **C. A. [1916] 1 K. B. 695**

—— *Edwards* v. *English* (1857) 7 E. & B. 564, 568.
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—— *Elderslie Steamship Co.* v. *Borthwick* [1905] A. C. 93.
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[1916] 1 K. B. 747, 756

—— *Elliott* v. *Liggens* - [1902] 2 K. B. 84
Judgments in, explained and followed. WARBURTON *v.* CO-OPERATIVE WHOLESALE SOCIETY - **[1916] 1 K. B. 906**

—— *Esposito* v. *Bowden* - (1857) 7 E. & B. 763
Referred to. ANDREW MILLAR & Co. *v.* TAYLOR & Co.
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HUGH STEVENSON & SONS, LD. *v.* AKTIENGESELLSCHAFT FÜR CARTONNAGEN-INDUSTRIE
[1916] 1 K. B. 763, 767
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C. A. [1916] 1 K. B. 541

—— *Farnol Eades Irvine & Co., In re* [1915] 1 Ch. 22.
Observations of Warrington J. in, approved. NESS *v.* O'NEIL
C. A. [1916] 1 K. . 706

—— *Fearon and Flinn, In re* (1869) L. R. 5 C. P. 34.
Referred to. LORD ASHBURTON *v.* GRAY - **Div. Ct. [1916] 1 K. B. 452**

—— *Fergusson* v. *Norman* (1838) 5 Bing. N. C. 76.
Referred to. LOUGHER *v.* MOLYNEUX
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—— *Fielding* v. *Turner* [1903] 1 K. B. 867, 871
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—— *Flude, Ld.* v. *Goldberg* [1915] W. N. 301; [1916] 1 K. B. 662, note.
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C. A. [1916] 1 K. B. 652

—— *Frederici* v. *Vanderzee* (1877) 2 C. P. D. 70
Referred to. *In re* WILSON - **Div. Ct. [1916] 1 K. B. 382**

—— *Frere and Staveley Taylor & Co. and North Shore Mill Co., In re* [1905] 1 K. B. 366.
Discussed. MILLER, GIBB & Co. *v.* SMITH & TYRER, LD. - - **Div. Ct. [1916] 1 K. B. 419**

—— *Fuller* v. *Lane* (1825) 2 Add. Ecc. 419, 425
Referred to. REX *v.* BISHOP OF SARUM
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—— *Furly* v. *Newnham* - (1780) 2 Doug. 419
Followed. REX *v.* VINE STREET POLICE STATION SUPERINTENDENT. *Ex parte* LIEBMANN **Div. Ct. [1916] 1 K. B. 268**

—— *Furnivall* v. *Hudson* - [1893] 1 Ch. 335
Followed. *In re* WILSON - **Div. Ct. [1916] 1 K. B. 382**

—— *Gadsden* v. *Barrow* - (1854) 9 Ex. 514
Referred to. PEAKE *v.* CARTER
C. A. [1916] 1 K. B. 652, 656

—— *Geiger, In re* - - [1915] 1 K. B. 439
Referred to. *In re* YEATMAN
[1916] 1 K. B. 461

—— *Geipel* v. *Smith* - (1872) L. R. 7 Q. B. 404
Referred to. ANDREW MILLAR & Co. *v.* TAYLOR & Co.
C. A. [1916] 1 K. B. 402
F. A. TAMPLIN STEAMSHIP Co. *v.* ANGLO-MEXICAN PETROLEUM PRODUCTS Co. - **C. A. [1916] 1 K. B. 485**

—— *Green* v. *Stevens* - (1857) 2 H. & N. 146, 147
Followed. PEAKE *v.* CARTER
C. A. [1916] 1 K. B. 652, 656

—— *Hadji Ali Akbar & Sons* v. *Anglo-Arabian Steamship Co.* (1906) 11 Com. Cas. 219.
Referred to. MORRISON & Co. *v.* SHAW, SAVILL AND ALBION Co.
[1916] 1 K. B. 747, 756

—— *Hadley* v. *Clarke* - (1799) 8 T. R. 259
Referred to. ANDREW MILLAR & Co. *v.* TAYLOR & Co.
C. A. [1916] 1 K. B. 402, 411

—— *Hall* v. *Wright* - (1859) E. B. & E. 746, 765
Observations on, by Phillimore L.J. JEFFERSON *v.* PASKELL
[1916] 1 K. B. 57

—— *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1887) 12 App. Cas. 518, 526.
Judgment of Lord Watson in, referred to. MORRISON & Co. *v.* SHAW, SAVILL AND ALBION Co.
[1916] 1 K. B. 747, 758

CASES—*continued.*

—— *Hargreave* v. *Haughhead Coal Co.* [1912] A. C. 319.
Applied. HART *v.* CORY BROTHERS, LD. **[1916] 1 K. B. 172**
LEVERINGTON *v.* A. DODMAN & Co.
C. A. [1916] 1 K. B. 964

—— *Hargroves, Aronson & Co.* v. *Hartopp* [1905] 1 K. B. 472.
Referred to. HART *v.* ROGERS
[1916] 1 K. B. 646

—— *Hayward* v. *Westleigh Colliery Co.* [1915] A. C. 540.
Referred to. BURVILL *v.* VICKERS, LD. **[1916] 1 K. B. 180**

—— *Hockey* v. *Evans* - (1887) 18 Q. B. D. 390
Referred to. PEAKE *v.* CARTER
C. A. [1916] 1 K. B. 652, 658

—— *Holmes* v. *Mentze* - (1835) 4 Ad. & E. 127
Referred to. PEAKE *v.* CARTER
C. A. [1916] 1 K. B. 652, 655

—— *Hough & Co.* v. *Head* (1885) 54 L. J. (Q. B.) 294.
Referred to. ADMIRAL SHIPPING Co. *v.* WEIDNER, HOPKINS & Co.
[1916] 1 K. B. 429

—— *Hudson* v. *Hill* (1874) 43 L. J. (C. P.) 273
Referred to. SCOTTISH NAVIGATION Co. *v.* W. A. SOUTER & Co.
[1916] 1 K. B. 675

—— *Inland Rev. Commrs.* v. *Sheffield and South Yorkshire Navigation Co.* [1915] 1 K. B. 725.
Affirmed - **C. A. [1916] 1 K. B. 882**

—— *Internationale Guano en Superphosphaatwerken* v. *Macandrew & Co.* [1909] 2 K. B. 360.
Judgment of Pickford J. in, referred to. MORRISON & Co. *v.* SHAW, SAVILL AND ALBION Co. - **[1916] 1 K. B. 747, 757**

—— *Jackson* v. *Union Marine Insurance Co.* (1873) L. R. 8 C. P. 572; (1874) L. R. 10 C. P. 125.
Distinguished. F. A. TAMPLIN STEAMSHIP Co. *v.* ANGLO-MEXICAN PETROLEUM PRODUCTS Co. - - **C. A. [1916] 1 K. B. 485**
Referred to. ANDREW MILLAR & Co. *v.* TAYLOR & Co. - - - **C. A. [1916] 1 K. B. 402**
SCOTTISH NAVIGATION Co. *v.* W. A. SOUTER & Co. - **[1916] 1 K. B. 675**

—— *James* v. *Brook* - - (1846) 9 Q. B. 7
Referred to. JONES *v.* JONES - **C. A. [1916] 1 K. B. 351**

—— *Jones* v. *Inland Rev. Commrs.* [1895] 1 Q. B. 484.
Referred to. UNDERGROUND ELECTRIC RYS. Co. OF LONDON AND OTHERS *v.* INLAND REV. COMMRS. - - **C. A. [1916] 1 K. B. 306**

—— *Jones* v. *Littler* - (1841) 7 M. & W. 423
Referred to. JONES *v.* JONES
C. A. [1916] 1 K. B. 351

CASES—*continued.*

—— *Kine* v. *Beaumont* (1822) 3 Brod. & B. 288
Distinguished. ANDREWS *v.* WIRRAL
R. D. C. - **C. A. [1916] 1 K. B. 863**

—— *Leonard* v. *Hoare & Co.* [1914] 2 K. B. 798
Overruled. REX *v.* FOOT'S CRAY
U. D. C. - - **[1916] 1 K. B. 246**

—— *Lewis* v. *Inland Rev. Commrs.* [1898] 2 Q. B. 290.
Referred to. UNDERGROUND ELECTRIC RYS. CO. OF LONDON AND OTHERS *v.* INLAND REV. COMMRS.
C. A. [1916] 1 K. B. 306

—— *Lilley* v. *Doubleday* - (1881) 7 Q. B. D. 510
Followed. MORRISON & Co. *v.* SHAW, SAVILL AND ALBION CO.
[1916] 1 K. B. 747

—— *Liver Alkali Co.* v. *Johnson* (1874) L. R. 9 Ex. 338.
Commented on. WATKINS *v.* COTTELL
[1916] 1 K. B. 10

—— *Lucy* v. *Bawden* - [1914] 2 K. B. 318
Referred to. HART *v.* ROGERS
[1916] 1 K. B. 646

—— *Lumby* v. *Allday* - (1831) 1 Cr. & J. 301
Referred to. JONES *v.* JONES
C. A. [1916] 1 K. B. 351

—— *Melville* v. *De Wolf* - (1855) 4 E. & B. 844
Referred to. ANDREW MILLAR & Co. *v.* TAYLOR & Co.
C. A. [1916] 1 K. B. 402

—— *Miller* v. *Hancock* - [1893] 2 Q. B. 177
Discussed. HART *v.* ROGERS
[1916] 1 K. B. 646

—— *National Telephone Co.* v. *Inland Rev. Commrs.* [1900] A. C. 1.
Referred to. UNDERGROUND ELECTRIC RYS. CO. OF LONDON AND OTHERS *v.* INLAND REV. COMMRS.
C. A. [1916] 1 K. B. 306

—— *Nobel's Explosives Co.* v. *Jenkins & Co.* [1896] 2 Q. B. 326.
Referred to. ANDREW MILLAR & Co. *v.* TAYLOR & Co.
C. A. [1916] 1 K. B. 402

—— *Pessers v. Catt* - (1913) 77 J. P. 429
Referred to. PEERS v. CALDWELL
Div. Ct. [1916] 1 K. B. 371

—— *Philipson* v. *Chase* - (1809) 2 Camp. 110
Explained. ANDREWS *v.* WIRRAL
R. D. C. - - **[1916] 1 K. B. 863**

—— *Pletts* v. *Beattie* - [1896] 1 Q. B. 519
Referred to. TITMUS *v.* LITTLEWOOD
Div. Ct. [1916] 1 K. B. 732

—— *Plummer* v. *Price* (1878) 39 L. T. 657, 658
Referred to. PEAKE *v.* CARTER
C. A. [1916] 1 K. B. 652, 657

—— *Porter* v. *Freudenberg* [1915] 1 K. B. 857
Followed. SCHAFFENIUS *v.* GOLDBERG
C. A. [1916] 1 K. B. 284

CASES—*continued.*

—— *Portland Urban Council and Tilley, In re* [1896] 2 Q. B. 98.
Discussed. MILLER, GIBB & Co. *v.* SMITH & TYRER, LD.
Div. Ct. [1916] 1 K. B. 419

—— *Quirk* v. *Thomas* (*Executor of*) [1915] 1 K. B. 798.
Affirmed - **C. A. [1916] 1 K. B. 516**

—— *Read* v. *Hudson* - (1700) 1 Ld. Raym. 610
Referred to. JONES *v.* JONES
C. A. [1916] 1 K. B. 351

—— *Reg.* v. *Berry* (1897) 104 L. T. Journ. 110
Referred to. REX *v.* LEE KUN
C. C. A. [1916] 1 K. B. 337

—— *Reg.* v. *Garland* (1870) L. R. 5 Q. B. 269, 272.
Referred to. REX *v.* BISHOP OF SARUM - - **[1916] 1 K. B. 466**

—— *Reg.* v. *Hannam* - (1886) 34 W. R. 355
Dictum of Bowen L.J. in, approved and followed. WHENMAN *v.* CLARK
[1916] 1 K. B. 94

—— *Rex* v. *Clark* - (1820) 1 Brod. & B. 473
Discussed. REX *v.* TONKS
C. C. A. [1916] 1 K. B. 443

—— *Rex* v. *Neal* - - (1835) 7 C. & P. 168
Doubted. REX *v.* WILLIS
[1916] 1 K. B. 933

—— *Rex* v. *Pritchard* - (1836) 7 C. & P. 303, 304
Referred to. REX *v.* LEE KUN
C. C. A. [1916] 1 K. B. 337

—— *Rex* v. *Rice* - (1696) 1 Ld. Raym. 138
Referred to. REX *v.* BISHOP OF SARUM
Div. Ct. [1916] 1 K. B. 466

—— *Rex* v. *Schiever* - (1759) 2 Burr. 765
Followed. REX *v.* VINE STREET POLICE STATION SUPERINTENDENT. *Ex parte* LIEBMANN **Div. Ct. [1916] 1 K. B. 268**

—— *Rex* v. *Simpson* - (1725) 1 Str. 609
Referred to. REX *v.* BISHOP OF SARUM
Div. Ct. [1916] 1 K. B. 466

—— *Rex* v. *Sowter* - - [1901] 1 Q. B. 66
Referred to. REX *v.* BISHOP OF SARUM - **Div. Ct. [1916] 1 K. B. 466**

—— *Rex* v. *Stafford Prison* (*Governor*) [1909] 2 K. B. 81.
Referred to. REX *v.* LEE KUN
C. C. A. [1916] 1 K. B. 337

—— *Rex* v. *Vine Street Police Station Superintendent; Ex parte Liebmann* [1916] 1 K. B. 268.
Dictum in, disapproved. SCHAFFENIUS *v.* GOLDBERG **C. A. [1916] 1 K. B. 284**

—— *Rex* v. *Williams* - (1828) 8 B. & C. 681
Referred to. REX *v.* BISHOP OF SARUM
Div. Ct. [1916] 1 K. B. 466

—— *Richards* v. *Jenkins* (1886) 17 Q. B. D. 544, 547.
Referred to. PEAKE *v.* CARTER
C. A. [1916] 1 K. B. 652, 656

CASES—*continued.*

—— *Robinson* v. *Brown* (1846) 16 L. J. (C.P.) 46.
Followed and applied. ANDREWS *v.* WIRRAL R. D. C.
C. A. [1916] 1 K. B. 863

—— *Roe* v. *Mutual Loan Fund* (1887) 19 Q. B. D. 347.
Principle of, applied. *In re* WILSON
Div. Ct. [1916] 1 K. B. 382

—— *Rushton* v. *George Skey & Co.* [1914] 3 K. B. 706.
Referred to. SKELTON *v.* BAXTER
C. A. [1916] 1 K. B. 321

—— *Scott* v. *Sanguhar and Kirkconnel Collieries* (1915) 8 B. W. C. C. 405.
Dissented from. MADDEN *v.* GUEST'S EXECUTORS - **C. A. [1916] 1 K. B. 76**

—— *Schroeder* v. *Hanrott* - (1873) 28 L. T. 704
Referred to. PEAKE *v.* CARTER
C. A. [1916] 1 K. B. 652, 657

—— *Smith's Dock Co.* v. *Tynemouth Corporation* [1908] 1 K. B. 956.
Judgment of Lord Alverstone C.J. in, explained. MERSEY DOCKS AND HARBOUR BOARD *v.* BIRKENHEAD CORPORATION - **C. A. [1916] 1 K. B. 695**

—— *Snell* v. *Gross, Sherwood & Heald* (1913) 6 B. W. C. C. 242.
Referred to. HIGGINS *v.* L. HIGGINS & Co. - **C. A. [1916] 1 K. B. 640**

—— *Sparenburgh* v. *Bannatyne* (1797) 1 Bos. & P. 163, 168.
Followed. SCHAFFENIUS *v.* GOLDBERG
C. A. [1916] 1 K. B. 284

—— *Stanton* v. *Smith* (1726) 2 Ld. Raym. 1480
Referred to. JONES *v.* JONES
C. A. [1916] 1 K. B. 351

—— *Stephenson* v. *Rogers* - (1899) 63 J. P. 230
Referred to. TITMUS *v.* LITTLEWOOD
Div. Ct. [1916] 1 K. B. 732

—— *Stephenson* v. *Rossall Steam Fishing Co.* (1915) 8 B. W. C. C. 209.
Distinguished. NEWSTEAD *v.* LABRADOR (OWNERS) **C. A. [1916] 1 K. B. 166**

—— *Strickland* v. *Whittaker* (1904) 68 J. P. 235.
Referred to. TITMUS *v.* LITTLEWOOD
[1916] 1 K. B. 732

—— *Surplice* v. *Farnsworth* (1844) 7 Man. & G. 576.
Followed. HART *v.* ROGERS
[1916] 1 K. B. 646

—— *Surtees* v. *Ellison* - (1829) 9 B. & C. 750
Followed. WATSON *v.* WINCH
Div. Ct. [1916] 1 K. B. 688

—— *Sweetmeat Automatic Delivery Co.* v. *Inland Rev. Commrs.* [1895] 1 Q. B. 484.
Referred to. UNDERGROUND ELECTRIC RYS. CO. OF LONDON AND OTHERS *v.* INLAND REV. COMMRS. - - **C. A. [1916] 1 K. B. 306**

CASES—*continued.*

—— *Tamplin (F. A.) Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* [1915] 3 K. B. 668.
Affirmed - **C. A. [1916] 1 K. B. 485**

—— *Tamplin (F. A.) Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* [1915] 3 K. B. 668; [1916] 1 K. B. 485.
Referred to. MODERN TRANSPORT CO. *v.* DUNERIC STEAMSHIP CO.
[1916] 1 K. B. 726

—— *Thames and Mersey Marine Insurance Co.* v. *British and Chilian Steamship Co.* [1915] 2 K. B. 214.
Affirmed - - **[1916] 1 K. B. 30**

—— *Three Spanish Sailors* - (1779) 2 W. Bl. 1324
Followed. REX *v.* VINE STREET POLICE STATION SUPERINTENDENT. *Ex parte* LIEBMANN **Div. Ct. [1916] 1 K. B. 268**

—— *Thurn and Taxis (Princess)* v. *Moffitt* [1915] 1 Ch. 58.
Followed. SCHAFFENIUS *v.* GOLDBERG
C. A. [1916] 1 K. B. 284

—— *Underground Electric Rys. Co. of London* v. *Inland Rev. Commrs.* [1906] A. C. 21.
Referred to. UNDERGROUND ELECTRIC RYS. CO. OF LONDON AND OTHERS *v.* INLAND REV. COMMRS.
C. A. [1916] 1 K. B. 306

—— *Underground Electric Rys. Co. of London and Others* v. *Inland Rev. Commrs.* [1914] 3 K. B. 210.
Affirmed - **C. A. [1916] 1 K. B. 306**

—— *Vavasour, In re* - [1900] 2 Q. B. 309
Referred to. *In re* YEATMAN
[1916] 1 K. B. 461

—— *Victorian Daylesford Syndicate* v. *Dott* [1905] 2 Ch. 624; [1906] 1 Ch. 747, n.
Referred to. LOUGHER *v.* MOLYNEUX
[1916] 1 K. B. 718

—— *Weber, Ex parte* - [1916] 1 K. B. 280, n.
Followed. REX *v.* VINE STREET POLICE STATION SUPERINTENDENT. *Ex parte* LIEBMANN **Div. Ct. [1916] 1 K. B. 268**

—— *Webster* v. *Delafield* - (1849) 7 C. B. 187, 191
Referred to. PEAKE *v.* CARTER
C. A. [1916] 1 K. B. 652, 660

—— *Wells* v. *Williams* (1697) 1 Ld. Raym. 282; 1 Salk. 46; 1 Lutw. 34.
Referred to. SCHAFFENIUS *v.* GOLDBERG - **C. A. [1916] 1 K. B. 284**

—— *Whenman* v. *Clark* - [1915] 1 K. B. 548
Varied - - **[1916] 1 K. B. 94**

—— *Whittington* v. *Gladwin* (1826) 5 B. & C. 180.
Referred to. JONES *v.* JONES
C. A. [1916] 1 K. B. 351

—— *Wilkins* v. *Birmingham Corporation* (1883) 25 Ch. D. 78.
Considered. LONDON C. C. v. WILSON'S EXECUTORS - **[1916] 1 K. B. 837**

CASES—*continued.*

—— *Williams Brothers* v. *Agius* [1914] A. C. 510.
Referred to. ANDREW WEIR & Co. *v.* DOBELL & Co. - [1916] 1 K. B. 722

—— *Zinc Corporation* v. *Hirsch* [1916] 1 K. B. 541.
Referred to. HUGH STEVENSON & SONS, LIMITED *v.* AKTIENGESELLSCHAFT FÜR CARTONNAGEN-INDUSTRIE [1916] 1 K. B. 763, 767

CENTRAL CONTROL BOARD (LIQUOR TRAFFIC) ORDER, JULY 30, 1915: THOMPSON *v.* DAVISON Div. Ct. [1916] 1 K. B. 917

CERTIFYING SURGEON — Contradiction — Appeal—Certificate final - - 980
See WORKMEN'S COMPENSATION. 12.

CERTIORARI — *Licence for Cinematograph Exhibitions—Conditions of Licence—Objection to Conditions by Third Person* — "*Person aggrieved.*"

A licensing authority under the Cinematograph Act, 1909, granted to a theatre proprietor a licence for the exhibition of cinematograph films at his theatre. The licence was subject to the condition that the licensee should not exhibit any film, if he had notice that the licensing authority objected to it. A firm who had acquired the sole right of exhibition of a certain film in the district in which the theatre was situated entered into an agreement with the licensee for the exhibition of the film at his theatre. The licensing authority having given notice to the licensee that they objected to the exhibition of the film, the firm applied for a writ of certiorari to bring up the notice to be quashed on the ground that the condition attached to the licence was unreasonable and void, and that they were aggrieved by the notice as being destructive of their property:—

Held, that, whether the condition was unreasonable or not, the applicants were not persons who were aggrieved by the notice and were not entitled to apply for a certiorari. *Ex parte* STOTT - - - - - - - Div. Ct. 7

CHARTERPARTY—Shipping.
See SHIPPING.

CHURCHWARDEN.
See ECCLESIASTICAL LAW.

C.I.F. CONTRACT.
See SALE OF GOODS.

CINEMATOGRAPH — Certiorari — Licence for cinematograph exhibitions—Conditions of licence—Objection to conditions by third person—"Person aggrieved" - 7
See CERTIORARI.

COAL—Mine.
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—— Weights and measures—Refusal by carman to assist in weighing coal—"Obstructing of the weighing" - - - - 224
See WEIGHTS AND MEASURES.

"COMMANDEER."
See SHIPPING.

COMPENSATION — Housing — Compulsory taking of land - - - - 837
See LOCAL GOVERNMENT. 5.

—— Licensing Acts—Reference of claim to Inland Revenue Commissioners — No agreement as to compensation submitted to compensation authority- 682
See LICENSING ACTS. 1.

—— Mines—Compensation for injury caused by mining—Subsidence of surface - 123
See MINE. 2.

—— Riot.
See LIMITATIONS, STATUTES OF.

—— Workmen's compensation.
See WORKMEN'S COMPENSATION.

COMPULSORY TAKING OF LAND—Housing of the working classes—Scheme—Date at which value is to be assessed - 837
See LOCAL GOVERNMENT. 5.

CONDITION—Licence for cinematograph exhibitions—Conditions of licence—Objection to conditions by third person—"Person aggrieved"—Certiorari - - 7
See CERTIORARI.

CONSTABLE—Police—Special constable—Power of Commissioner of Metropolitan Police to dismiss—Special Constables Act, 1831
See POLICE. 190

CONTRACT—Alien enemy—Contract—Implied basis of—Tenancy of house—Tenant an alien enemy—Aliens Restriction Order—Tenant prohibited from residing in district—Liability for rent - - 20
See ALIEN ENEMY. 2.

2. —— C.i.f.
See SALE OF GOODS.

3. —— Employer and workman.
See WORKMEN'S COMPENSATION.

4. —— *Impossibility of Performance—Supervening Illegality — Supply of Gas for Street Lamps—Order restraining Lighting — Defence of Realm Acts.*

A gas company agreed for five years with a local authority, for the purpose of lighting the streets within their district, to furnish certain street lamps and connect them with the gas mains and to supply gas and to light, extinguish, and maintain the lamps. The local authority agreed to pay an annual sum per lamp, payments to be made in four equal quarterly instalments. While the contract was running, the gas company having so far performed their part of the contract, an Order was made under the Defence of the Realm Acts prohibiting until further order the lighting of the street lamps. The gas company claimed three quarters' instalments from the date of the Order:—

Held, that inasmuch as the Order, having been made on an emergency, did not render the

CONTRACT—*continued.*
lighting absolutely and completely unlawful or the further performance of the contract once for all impossible, the local authority were not excused from payment. LEISTON GAS CO. *v.* LEISTON-CUM-SIZEWELL U. D. C. - **Low J. 912**

5. —— *Lump Sum—Work not completed—Abandonment of Contract—Right to sue on Quantum Meruit.*

Where a builder has supplied work and labour for the erection or repair of a house under a lump sum contract, but has departed from the terms of the contract, he is entitled to recover for his services, unless (1.) the work that he has done has been of no benefit to the owner; (2.) the work he has done is entirely different from the work which he has contracted to do; or (3.) he has abandoned the work and left it unfinished.

Decision of Divisional Court (Ridley and Sankey JJ.) (1915) 84 L. J. (K. B.) 1031 affirmed. H. DAKIN & CO., LD. *v.* LEE - - **C. A. 566**

—— Principal and surety—Bond for due performance of contract — Litigation between parties to contract—Contractor ordered to pay costs — Liability of surety - - - - - - **25**
See PRINCIPAL AND SURETY.

—— Railway — Regulation — Demurrage on trucks — Receiver of goods — Privity of contract—Computation of time for unloading - - - - - - **263**
See RAILWAY.

—— Sale of goods.
See SALE OF GOODS.

—— Shipping—Bill of lading—Contract of liability for unseaworthiness—Unseaworthy ship—Limitation of time for claims—Applicability of limitation in case of unseaworthiness—Transhipment of goods - - - - - - **39**
See SHIPPING. 1.

CONTRACTOR—Principal and surety—Bond for due performance of contract—Litigation between parties to contract—Contractor ordered to pay costs — Liability of surety - - - - - - - **25**
See PRINCIPAL AND SURETY.

COSTS—Arbitration.
See ARBITRATION.

—— Bankruptcy - - - - - - **461**
See BANKRUPTCY. 1.

—— Principal and surety — Bond for due performance of contract — Litigation between parties to contract—Contractor ordered to pay costs — Liability of surety - - - - - - - **25**
See PRINCIPAL AND SURETY.

—— Workmen's compensation — Discretion — Successful party ordered to pay costs **640**
See WORKMEN'S COMPENSATION. 10.

COUNTY COURT—*Interpleader—Proceeding at Instance of Sheriff remitted from High Court—No Claim for Damages in Proceeding in the County Court—Subsequent Action by successful Claimant for Damages—County Court Rules, Order XXVII., r. 8; Order XXXIII., r. 11.*

Order XXXIII., r. 11, of the County Court Rules, which provides that no claim for damages shall be allowed in any interpleader proceeding commenced at the instance of the sheriff and remitted from the High Court, is not ultra vires. Therefore the successful claimant to goods in such a proceeding is not precluded from bringing a subsequent action against the execution creditor and his solicitor for damages for trespass to his goods. SALBSTEIN *v.* ISAACS & SON - **Div. Ct. 1**

2. —— *Jurisdiction — District in which Defendant "carries on his business"—Defendant a Director of a Company carrying on Business in the District — County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 74.

By s. 74 of the County Courts Act, 1888, "Every action or matter may be commenced in the Court within the district of which the defendant . . . . shall dwell or carry on his business":—

Held, that for that purpose the business of a joint-stock company is not the business of its directors; and that the mere fact that such a company carries on business within the district of a particular county court does not render a director of the company liable to be sued in that county court in respect of a cause of action arising outside the district. CAIN *v.* BUTLER **Div. Ct. 759**

3. —— *Payment into Court—Notice denying Liability—Action of Negligence—Admission of Negligence—Denial of Damage—Form of Notice—County Court Rules*, 1903 *and* 1914, *Order IX., r.* 12.

The plaintiffs claimed damages in the county court for injury to their horse caused through the negligence of the defendants' servant. The defendants paid into Court under Order IX., r. 12, of the County Court Rules, 1903 and 1914, a sum of 40*l.* with the following notice:—"Take notice that the defendants admit that the accident was caused through their negligence, but that they deny the alleged damage, and, whilst in this manner denying liability, they bring into Court the sum of 40*l.*, and 2*l.* 9*s.* 10*d.* in respect of costs, and say that this sum is sufficient to satisfy the plaintiffs' claim."

The plaintiffs recovered the amount paid into Court and no more:—

Held, that, damage being the gist of the action, the notice admitting negligence but denying damage was a valid and proper notice denying liability, and that the defendants should have the costs of the action incurred after the date of the payment into Court.

Critchell v. *London and South Western Ry. Co.* [1907] 1 K. B. 860 distinguished. J. R. MUNDY, LD. *v.* LONDON COUNTY COUNCIL **Div. Ct. 159**

COUNTY COURT RULES, Order IX., r. 12: MUNDY (J. R.), LD. *v.* LONDON COUNTY COUNCIL **Div. Ct. [1916] 1 K. B. 159**

COUNTY COURT RULES—*continued.*

—— Order XXVII., r. 8: SALBSTEIN *v.* ISAACS & SON - - - [1916] 1 K. B. 1

—— Order XXXIII., r. 11: SALBSTEIN *v.* ISAACS & SON - - [1916] 1 K. B. 1

COUNTY COURT (AGRICULTURAL HOLDINGS) RULES, 1909, Order XL., r. 4, sub-rr. 1, 14: LENDON *v.* KEEN Div. Ct. [1916] 1 K. B. 994

COURTS (EMERGENCY POWERS) ACT, 1914—*Lessor and Lessee—Forfeiture for Non-payment of Rent—Action to recover Possession—"Exercise any right of re-entry"—Leave of Court—Courts (Emergency Powers) Act,* 1914 (4 & 5 *Geo.* 5, *c.* 78), *s.* 1, *sub-s.* 1 (*b*).

Leave of the Court is not necessary under s. 1, sub-s. 1 (*b*), of the Courts (Emergency Powers) Act, 1914, to entitle a landlord to bring an action against his tenant to recover possession of the demised premises under a clause of re-entry for non-payment of rent. Leave, however, is necessary for the issue of a writ of possession upon a judgment obtained in such an action.

Observations of Warrington J. in *In re Farnol Eades Irvine & Co.* [1915] 1 Ch. 22 approved. NESS *v.* O'NEIL - - C. A. 706

2. —— *Stock Exchange—Stockbroker and Client—Purchase of Shares—Resale at a Loss—Power of Stockbroker to resell without the Leave of the Court—Courts (Emergency Powers) Act,* 1914 (4 & 5 *Geo.* 5, *c.* 78), *s.* 1, *sub-s.* 1 (*b*).

By 4 & 5 Geo. 5, c. 78, s. 1, sub-s. 1, "From and after the passing of this Act no person shall . . . . (*b*) levy any distress, take, resume, or enter into possession of any property, exercise any right of re-entry, foreclose, realise any security (except by way of sale by a mortgagee in possession), forfeit any deposit, or enforce the lapse of any policy of insurance to which this sub-section applies, for the purpose of enforcing the payment or recovery of any sum of money to which the sub-section applies, or, in default of the payment or recovery of any such sum of money, except after such application to such Court and such notice as may be provided for by rules or directions under this Act." .

In July, 1914, the plaintiff, a stockbroker on the London Stock Exchange, bought from a jobber certain shares on the instructions of the defendant. The plaintiff paid the jobber for the shares, but, as the defendant declined to take delivery and pay for them at the settlement, the plaintiff sold them at a loss, and sued the defendant for the difference between the money paid for them and the amount which they realized at the resale :—

Held, that, assuming (but without deciding) that the shares were a "security" within the meaning of that term in s. 1, sub-s. 1 (*b*), of the Courts (Emergency Powers) Act, 1914, the plaintiff was at the time he realized a mortgagee in possession, and was therefore entitled to realize the security without first obtaining the leave of the Court.

Decision of Sankey J. [1915] 2 K. B. 288 affirmed on different grounds. BARNARD *v.* FOSTER - - - - - - C. A. 632

COVENANT—Revenue—Income tax—Deduction—Annual payment—Permanent maintenance—"Free of income tax" - 230
See REVENUE. 2.

CREAM—Sale of "preserved"—Cream mixed with boric acid - - - - 878
See ADULTERATION.

CRIMINAL LAW—*Autrefois convict, Plea of—Summary Conviction for neglecting Child in Manner likely to cause Unnecessary Suffering or Injury to Health—Subsequent Death of Child—Indictment for Manslaughter—Question raised at Trial but no formal Plea—Power of Court of Criminal Appeal to entertain Appeal—Criminal Appeal Act,* 1907 (7 *Edw.* 7, *c.* 23), *s.* 3 (*a*), (*b*)—*Children Act,* 1908 (8 *Edw.* 7, *c.* 67), *s.* 12, *sub-ss.* 1 (*b*), 3, 4.

By s. 3 of the Criminal Appeal Act, 1907, "A person convicted on indictment may appeal . . . . to the Court of Criminal Appeal—(*a*) against his conviction on any ground of appeal which involves a question of law alone ; and (*b*) with the leave of the Court of Criminal Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground . . . . which involves . . . . a question of mixed law and fact, or any other ground which appears to the Court to be a sufficient ground of appeal . . . ."

At the trial for manslaughter of a prisoner who was undefended a discussion took place between the judge and counsel for the prosecution as to whether a plea of autrefois convict could be established. The judge came to the conclusion that the plea could not be established and proceeded with the trial. The jury convicted the prisoner. The judge gave leave to appeal, but no certificate was drawn up. The prisoner having appealed :—

Held, that the mere technicality that there had been no formal plea of autrefois convict and no certificate drawn up did not prevent the Court of Criminal Appeal from doing what was right, and that the prisoner was therefore entitled to appeal as if there had been a plea of autrefois convict and the judge had held that there was no case to go to the jury upon the plea.

Rex v. *Clark* (1820) 1 Brod. & B. 473 is not an authority for the test as to the sufficiency of a plea of autrefois convict laid down in Archbold's Criminal Pleading, 24th ed., at p. 177.

Illustration in Stephen's Digest of Criminal Procedure (1883 ed.), p. 174, of proof of plea of autrefois convict or acquit upon an indictment for murder by proving former conviction for concealment of birth not assented to.

By s. 12, sub-s. 4, of the Children Act, 1908, "upon the trial of any person . . . . for the manslaughter of a child . . . . of whom he had the custody . . . . it shall be lawful for the jury, if they are satisfied that the accused is guilty of" one of the lesser offences mentioned in the section, "to find the accused guilty of such offence" :—

Held, that the sub-section does not mean that the jury can convict the prisoner of one of the lesser offences mentioned in the section, although

CRIMINAL LAW—*continued.*
they think that he is guilty of manslaughter; it means that they are at liberty to convict the prisoner of the lesser offence, if that is what they think their true verdict ought to be upon the facts, notwithstanding that he is charged with manslaughter. REX *v.* TONKS - **C. C. A. 443**

2. —— *Evidence — Accomplice — Corroboration by Wife of another Accomplice.*
On the trial of an indictment one of several accomplices in the crime charged was called as a witness against the accused. His evidence was corroborated by that of the wife of another accomplice who was not called. The wife was herself innocent of any connection with the crime :—
Held, that under those circumstances the jury were entitled to rely upon her evidence as good corroboration, and that the mere fact that she was the wife of an accomplice, and that her evidence was not itself corroborated by an independent witness, did not disentitle it to credit.
Semble that *Rex* v. *Neal* (1835) 7 C. & P. 168 was wrongly decided. REX *v.* WILLIS
C. C. A. 933

3. —— *Trial — Foreigner — Ignorance of English—Translation of Evidence—Practice.*
When a foreigner who is ignorant of the English language is on trial on an indictment for a criminal offence, and is not defended by counsel, the evidence given at the trial must be translated to him, and compliance with this rule cannot be waived by the prisoner. If he is defended by counsel, the evidence must be translated to him, unless he or his counsel express a wish to dispense with the translation and the judge thinks fit to permit the omission, but the judge should not permit it, unless he is of opinion that the accused substantially understands the nature of the evidence which is going to be given against him. REX *v.* LEE KUN
C. C. A. 337

DAMAGE—County court—Practice—Denial of damage—Form of notice - - **159**
See COUNTY COURT. 3.

—— Highway—Sheep straying on—Damage to vehicle using highway - - - **206**
See NUISANCE. 2.

DAMAGES—Interpleader—No claim for damages in proceeding in the county court—Subsequent action by successful claimant for damages—Practice - **1**
See COUNTY COURT. 1.

—— Measure of—Charterparty—Sub-charter—Breach of by sub-charterer - - **722**
See SHIPPING. 7.

DANGEROUS ACT — Highway — Nuisance — Negligence—Repair of gas main—Fire and molten lead on land adjacent to highway—Injury to child - **33**
See NUISANCE. 1.

DEDUCTION—Revenue — Income tax — Covenant — Annual payment — Permanent maintenance—"Free of income tax"
See REVENUE. 2. **230**

DEED OF ARRANGEMENT
See BANKRUPTCY

DEFAMATION—*Slander — Cause of Action—Words imputing Moral Misconduct—Not spoken of Plaintiff in Relation to his Calling—Head Teacher of Council School—No Special Damage alleged or proved.*
An imputation of immorality against a person engaged in any profession or occupation in which a good moral character is specially requisite is not actionable per se, unless the imputation itself be connected with the person's occupation or employment, or the person slandered be a clergyman holding clerical preferment or employment of temporal profit. To hold to the contrary would be an extension of the law of slander, which must be made by the Legislature and not by judicial decision.
So *held* in the case of the headmaster of a council school, against whom an imputation that he had been guilty of adultery was made, without any relation to his position as a schoolmaster. JONES *v.* JONES AND WIFE - **C. A. 351**

DEFENCE OF THE REALM—*Order in Council authorizing Internment of British Subject—Validity of—Defence of the Realm (Consolidation) Act*, 1914 (5 *Geo.* 5, *c.* 8)—*Defence of the Realm (Consolidation) Regulations*, 1914, *reg.* 14B.
The making of reg. 14B of the Defence of the Realm (Consolidation) Regulations, 1914, which empowers the Secretary of State to order the internment of any person "of hostile origin or associations" even though he may be a naturalized British subject, was within the power of making regulations "for securing the public safety and the defence of the realm" conferred upon the King in Council by s. 1, sub-s. 1, of the Defence of the Realm (Consolidation) Act, 1914. REX *v.* HALLIDAY - - - **Div. Ct. 738**

DEFENCE OF THE REALM (CONSOLIDATION) REGULATIONS, 1914, reg. 14b: REX *v.* HALLIDAY
Div. Ct. [1916] 1 K. B. 738

DEFENCE OF THE REALM (LIQUOR CONTROL) REGULATIONS, 1915: THOMPSON *v.* DAVISON
Div. Ct. [1916] 1 K. B. 917

DEMURRAGE—Railway—Regulation—Demurrage on trucks—Receiver of goods—Privity of contract—Computation of time for unloading - - - **263**
See RAILWAY.

DEPENDANT—Death from accident of father of married woman living with her husband - - - - - **899**
See WORKMEN'S COMPENSATION. 11.

"DEPOSITED IN ANY PLACE" - - **425**
See PUBLIC HEALTH. 3.

DISCRETION — Court — Reopening taxation *See* BANKRUPTCY. 1. 461

DISMISSAL—Special constable—Power of Commissioner of Metropolitan Police to dismiss - - - - - - - 190
See POLICE.

ECCLESIASTICAL LAW. — *Churchwarden — Refusal by Bishop to allow Churchwarden to make Declaration—Duty of Bishop.*

Where a person to whom no statutory or common law disability attaches has been elected to the office of churchwarden, the bishop is bound to admit him to make the declaration required by s. 9 of the Statutory Declarations Act, 1835, notwithstanding that the bishop judging from his known character or from his words or conduct may not consider him a fit and proper person to hold the office of churchwarden. REX *v.* BISHOP OF SARUM - - - Div. Ct. 466

EMPLOYER AND WORKMAN.
See WORKMEN'S COMPENSATION.

ENEMY—Alien enemy.
See ALIEN ENEMY.

EVIDENCE — Accomplice — Corroboration by wife of another accomplice - - 933
See CRIMINAL LAW. 2.

—— Employer and workman—Compensation 76
See WORKMEN'S COMPENSATION. 5.

—— Workmen's compensation - - - 180
See WORKMEN'S COMPENSATION. 3.

EXECUTOR — Marriage — Breach of promise—Action against executor of promisor—Special damage - - - 516
See MARRIAGE. 1.

FACTORY—*Offence—Summary Proceedings for —Limitation of Time for laying Information—Factory and Workshop Act*, 1901 (1 *Edw.* 7, *c.* 22), *s.* 146, *sub-s.* 1.

By s. 146, sub-s. 1, of the Factory and Workshop Act, 1901, it is provided with respect to summary proceedings for offences under that Act that "The information shall be laid within three months after the date at which the offence comes to the knowledge of the inspector for the district within which the offence is charged to have been committed, or, in case of an inquest being held in relation to the offence, then within two months after the conclusion of the inquest, so, however, that it be not laid after the expiration of six months from the commission of the offence":—

Held, that, in case of an inquest being held, the information is in time, if it is laid within three months after the offence has come to the knowledge of the inspector, or within two months after the conclusion of the inquest, whichever period is the longer, provided it is laid within six months after the commission of the offence. BOYDEL *v.* LEVANT MINE ADVENTURERS - - - - Div. Ct. 692

FISHING VESSEL—Employer and workman—Compensation—Seaman - - 166
See WORKMEN'S COMPENSATION. 9.

FLAT—Landlord and tenant—Landlord retaining possession of roof—Liability to repair roof — Negligence — Absolute liability - - - - - 646
See LANDLORD AND TENANT. 9.

FOREIGNER—Trial—Ignorance of English—Translation of evidence - - 337
See CRIMINAL LAW. 3.

FORFEITURE FOR NON-PAYMENT OF RENT —Lessor and lessee—Action to recover possession — "Exercise any right of re-entry"—Leave of Court - 706
See COURTS (EMERGENCY POWERS) ACT, 1914. 1.

FRIENDLY SOCIETY—*Loan to Member—Excess of Statutory Limit — Express Prohibition — Transaction illegal and void—Friendly Societies Act*, 1896 (59 & 60 *Vict. c.* 25), *ss.* 46, 84, 89.

The Friendly Societies Act, 1896, by s. 46 (*c*) provides that a registered society "shall not make any loan" to a member exceeding 50*l.*, and (s. 84) makes it an offence to do "anything forbidden by this Act" subject to a penalty of 50*l.* (s. 89). Therefore a loan exceeding 50*l.* by a registered society to a member is an illegal and void transaction and the money cannot be recovered.

In re Coltman (1881) 19 Ch. D. 64 distinguished. LOUGHER *v.* MOLYNEUX
Low J. 718

FURNITURE REMOVER — Carrier — Whether liable as an insurer—Person exercising a public employment - - - 10
See CARRIER.

GAS—Supply of, for street lamps—Order restraining lighting—Defence of Realm Acts — Impossibility of performance — Supervening illegality - - - 912
See CONTRACT. 4.

GAS MAIN—Highway—Nuisance—Negligence —Repair of gas main—Dangerous act —Fire and molten lead on land adjacent to highway—Injury to child 33
See NUISANCE. 1.

GRAVING DOCKS — General district rate — Occupation of land — "Land covered with water" - - - - 695
See RATES. 1.

HIGHWAY—Negligence—Motor left unattended —Liability—Intervening act of third party - - - - - - 148
See NEGLIGENCE. 3.

—— Negligence — Repair of gas main — Dangerous act—Fire and molten lead on land adjacent to highway—Injury to child - - - - - 33
See NUISANCE. 1.

HIGHWAY—*continued.*

—— Nuisance—Sheep straying on highway—Damage to vehicle using highway 206
See NUISANCE. 2.

HOUSING—Working classes—Scheme—Taking of land compulsorily—Date at which value is to be assessed - - - 837
See LOCAL GOVERNMENT. 5.

HUSBAND AND WIFE—*Action by Husband against Wife—Action to restrain Wife from purporting to pledge Credit of Husband—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75).

An action will not lie by a husband against his wife for an injunction to restrain her from pledging his credit. WEBSTER *v.* WEBSTER
Rowlatt J. 714

ILLNESS—Marriage—Breach of promise—Illness of plaintiff at date fixed for marriage—Defence of illness - 57
See MARRIAGE. 2.

IMPOSSIBILITY OF PERFORMANCE — Contract—Supervening illegality—Supply of gas for street lamps—Order restraining lighting—Defence of Realm Acts
See CONTRACT. 4. 912

INCOME TAX—Revenue.
See REVENUE.

INCREMENT VALUE DUTY.
See REVENUE.

INDUSTRIAL DISEASE.
See WORKMEN'S COMPENSATION.

INFANT — Workmen's compensation—Service irregular—Waiver by appearance—Indefeasible right to redemption - 85
See WORKMEN'S COMPENSATION. 7.

INFORMATION—Limitation of time for laying—Factory — Offence — Summary proceedings - - - - - 692
See FACTORY.

INJURY—Mining - - - - - 123
See MINE. 2.

—— Workmen's compensation.
See WORKMEN'S COMPENSATION.

INLAND REVENUE COMMISSIONERS — Reference of claim to - - - 682
See LICENSING ACTS. 1.

INSURANCE (JEWELLERY)—*Goods consigned Abroad on "sale or return"—Outbreak of War with Country of Consignee—Prohibition of Consignee from dealing with Goods—Total Loss.*

The plaintiffs, who carried on business as jewellers in London, insured their stock of jewellery for a year against "loss of or damage or misfortune to the property arising from any cause whatsoever." In July, 1914, they consigned certain articles of the jewellery so insured to merchants in Germany on sale or return. By

INSURANCE (JEWELLERY)—*continued.*

the custom of the jewellery trade the person so receiving goods on sale or return has a limited time within which to make up his mind whether he will purchase the goods or return them. By reason of the outbreak of war the German merchants were prevented by law from dealing in any way with the jewellery, which was the property of British subjects:—

Held, that the fact that the consignees were indefinitely prevented from either purchasing the jewellery or returning it amounted to a total loss within the policy. MOORE *v.* EVANS
Rowlatt J. 479

INSURANCE (MARINE)—*Ship valued in Policy at Less than Real Value—Collision Action—Loss recovered by Assured on Basis of Real Value—Subrogation of Underwriters paying on Total Loss—Extent of their Rights against Assured.*

A ship was insured for 45,000*l.* on an agreed value of 45,000*l.* As the result of a collision with another ship she was sunk, and the underwriters paid the amount insured as for a total loss. In an action of collision in the Admiralty Division both ships were held to blame, and the owners of the insured ship were held entitled to recover from the owners of the other ship five-twelfths only of their loss. For the purposes of that judgment the value of the ship was taken at its actual value, which was 65,000*l.*, and the assured were paid five-twelfths of that sum. The underwriters claimed to be subrogated to the rights of the assured in respect of the amount so recovered:—

Held, that as the amount so recovered by the assured did not exceed the amount paid by the underwriters on the policy, the underwriters were entitled to recover from the assured the whole of the amount recovered by them in the admiralty action, notwithstanding that it was based upon a value which was higher than that agreed in the policy.

Decision of Scrutton J. [1915] 2 K. B. 214 affirmed. THAMES AND MERSEY MARINE INSURANCE CO. *v.* BRITISH AND CHILIAN STEAMSHIP CO. - - - - - - - C. A. 30

INSURANCE (NATIONAL) — *Employed Contributor—Whether Outworker employed otherwise than by Way of Manual Labour—Summons against Employer for Non-payment of Contribution — Jurisdiction of Justices where no Determination by Insurance Commissioners — National Insurance Act*, 1911 (1 & 2 *Geo.* 5, *c.* 55), *ss.* 66, 69; *Sched. I., Part I.* (*c*), *Part II.* (*q*).

On a prosecution under s. 69 of the National Insurance Act, 1911, of an employer for failure to pay any contribution in respect of a person alleged to be an employed contributor, the jurisdiction of justices to decide whether the employment of that person is employment within the meaning of Part I. of the Act is not ousted by the fact that there has been no determination of that question by the Insurance Commissioners under s. 66, sub-s. 1, of the Act.

Don Brothers, Buist & Co. v. *Scottish Ins. Commrs.*, 1913 S. C. 607, distinguished.

REX *v.* WILBERFORCE. *Ex parte* NATIONAL INS. COMMRS. - - - - Div. Ct. 239

INSURANCE (NATIONAL)—*continued.*

2. —— *Panel Doctor — Extravagant Prescriptions—Power of Insurance Committee to surcharge Doctor—National Insurance Act*, 1911 (1 & 2 *Geo.* 5, *c.* 55), *ss.* 8, 15, 65—*National Health Insurance (Medical Benefit) Regulations*, 1913, *reg.* 40—*Validity of.*

Regulation 40 of the National Health Insurance (Medical Benefit) Regulations, 1913, which provides that an insurance committee, constituted by the National Insurance Act, 1911, may, if satisfied that an excessive demand upon their drug fund has arisen owing to orders given by a practitioner on their panel which are extravagant either in character or in quantity, surcharge the practitioner, is not ultra vires. O'NEILL *v.* MIDDLESEX INSURANCE COMMITTEE
Rowlatt J. 331

INSURER — Carrier — Furniture remover — Whether liable as an insurer—Person exercising a public employment - **10**
See CARRIER.

INTERNMENT - - - - - - - **738**
See DEFENCE OF THE REALM.

INTERPLEADER—County court - - **1**
See COUNTY COURT. 1.

2. —— *Right of Claimant to rely on a Title other than that which Issue directed to try.*

The general rule upon the trial of an interpleader issue is that, where a claimant claims under a title which he fails to prove, he is not thereby precluded from relying on the title found.

Flude, Ld. v. *Goldberg* [1915] W. N. 301; [1916] 1 K. B. 662, note, distinguished. PEAKE *v.* CARTER - - - - - - **C. A. 652**

3. —— *Right of Claimant to rely on a Title other than that which Issue directed to try.*

Goods having been seized in execution of a judgment recovered against one of two partners, the other partner claimed them as his sole property. At the trial of an interpleader issue directed to try the validity of that claim, the jury found that the goods were the property of the partnership:—

Held, that, upon the special facts of the case, the claimant was precluded from relying upon the title found. FLUDE, LD. *v.* GOLDBERG
C. A. 662, n.

INTOXICATING LIQUOR—Sale or supply of—Gratuitous supply to friend of licensee—Offence - - - - - - **917**
See LICENSING ACTS. 3.

JEWELLERY INSURANCE.
See INSURANCE (JEWELLERY).

JUDGE—Duty of, to take a note—Workmen's compensation — Proceedings before arbitrator—Question of law raised **970**
See WORKMEN'S COMPENSATION. 14.

JURISDICTION — County court — District in which defendant "carries on his business"—Defendant a director of a company carrying on business in the district - - - - - - **759**
See COUNTY COURT. 2.

JUSTICES — Insurance (National) — Employed contributor - - - - - **239**
See INSURANCE (NATIONAL). 1.

—— Police.
See POLICE.

—— Rates.
See RATES.

—— Sunday observance.
See SUNDAY OBSERVANCE.

—— Weights and measures.
See WEIGHTS AND MEASURES.

KNACKER'S YARD—Licence—District council—Appeal from grant or refusal - **665**
See LOCAL GOVERNMENT. 4.

LANCASHIRE AND YORKSHIRE RAILWAY, &c. (RAILWAY RATES AND CHARGES, No. 10) ORDER CONFIRMATION ACT, 1892 (55 & 56 Vict. c. xlviii.), Schedule, s. 5, sub-s. 4 - 263
See RAILWAY.

"LAND COVERED WITH WATER": MERSEY DOCKS AND HARBOUR BOARD *v.* BIRKENHEAD CORPORATION
C. A. [1916] 1 K. B. 695

LANDLORD AND TENANT—*Flat—Landlord retaining Possession of Roof—Liability to repair Roof—Negligence—Absolute Liability.*

Landlords let to a tenant a flat on the top floor of a building but retained possession and control of the roof. Water having found its way into the flat through cracks in the roof:—

Held, that the landlords were bound to repair the roof, and that they did not discharge this obligation by showing that they took reasonable care to keep it in repair. HART *v.* ROGERS
Scrutton J. 646

—— Forfeiture for non-payment of rent—Action to recover possession—"Exercise any right of re-entry"—Leave of Court—Courts (Emergency Powers) Act, 1914 - - - - - - **706**
See COURTS (EMERGENCY POWERS) ACT, 1914. 1.

LEASE—Mining—Minerals comprised in—Increment value duty - - - **882**
See REVENUE. 3.

——Mining lease—Subsequent grant of building lease with reservation of mines—Compensation for injury caused by mining—Subsidence of surface—Liability of mining lessees and lessor to building lessee - - - - **123**
See MINE. 2.

LEGAL PROCEEDINGS AGAINST ENEMIES ACT, 1915 - - - - 763
See ALIEN ENEMY. 4.

LICENCE — Carriage — Expiration of period allowed for paying duty—Person summoned for keeping carriage on day within that period - - - 710
See REVENUE. 1.

—— Certiorari — Licence for cinematograph exhibitions — Conditions of licence—Objection to conditions by third person —"Person aggrieved" - - - 7
See CERTIORARI.

LICENSED PREMISES.
See LICENSING ACTS.

LICENSING ACTS—*Compensation—Reference of Claim to Inland Revenue Commissioners—No Agreement as to Compensation submitted to Compensation Authority—Licensing Rules*, 1910, *r.* 31—*Licensing (Consolidation) Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 20.

Where the renewal of a licence has been refused by the compensation authority subject to the payment of compensation, no obligation is imposed by the Licensing (Consolidation) Act, 1910, or by the Licensing Rules, 1910, upon the persons entitled to compensation to submit any agreement that may have been arrived at as to the amount to the compensation authority for their approval; and, therefore, where no agreement is submitted, the matter must be referred to the Inland Revenue Commissioners under r. 31 of the Licensing Rules, 1910. REX *v.* SHEFFIELD JJ. *Ex parte* MORRISON - **Div. Ct. 682**

2. —— *Offences—Sale at Place not authorized by Licence—Agreement to Sell—Licensing (Consolidation) Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 65, *sub-ss.* 1, 2; *s.* 85.

By s. 65, sub-s. 1, of the Licensing (Consolidation) Act, 1910, a person shall not "sell" any intoxicating liquor at any place except that for which he holds a licence "for the sale" of that liquor, and by sub-s. 2, if he acts in contravention of the section, he is made liable to penalties:—

Held, that the words "sell" and "sale" refer to a completed sale, and that a person who, on unlicensed premises, merely enters into an executory agreement for the sale of intoxicating liquor is not liable to the penalties imposed by the section. TITMUS *v.* LITTLEWOOD - **Div. Ct. 732**

3. ——*Sale or Supply of Intoxicating Liquor — Gratuitous Supply to Friend of Licensee — Offence—Defence of the Realm (Liquor Control) Regulations*, 1915 — *Central Control Board (Liquor Traffic) Order*, *July* 30, 1915.

The Defence of the Realm (Liquor Control) Regulations, 1915, made in pursuance of the Defence of the Realm (Amendment) (No. 3) Act, 1915, provide that the Central Control Board (Liquor Traffic) may "for the purposes of the control of the sale and supply of any intoxicating liquor" regulate the hours of closing of any licensed premises or club, and by regulation 27, "for the purpose of these Regulations the expression 'supply' in relation to intoxicating liquor means supply otherwise than by way of sale."

By an Order made under the Regulations on July 30, 1915, it was provided (inter alia) that after 9 P.M. on weekdays no person should "sell or supply to any person in any licensed premises or club any intoxicating liquor to be consumed on the premises, or permit any person to consume in any such premises or club any intoxicating liquor," except in the case of a person residing in the licensed premises or club.

At 11 P.M. on a weekday the respondent, the licensee of a public-house, supplied whisky in the public-house gratuitously to a man who was a personal friend of the respondent, and who consumed the whisky in the house:—

Held, that the Order applied to a case where a licensee was entertaining his personal friends, and that the respondent had acted in contravention of the Order.

Blakey v. *Harrison* [1915] 3 K. B. 258 distinguished. THOMPSON *v.* DAVISON **Div. Ct. 917**

LICENSING RULES, 1910, r. 31: REX *v.* SHEFFIELD JJ. *Ex parte* MORRISON **Div. Ct. [1916] 1 K. B. 682**

LIMITATION OF TIME—Laying information—Factory — Offence — Summary proceedings for - - - - 692
See FACTORY.

—— Shipping—Limitation of time for claims
See SHIPPING. 1. 39

LIMITATIONS, STATUTES OF—*Public Authorities' Protection—Claim for Compensation for Damage by Riot—Riot (Damages) Act*, 1886 (49 *&* 50 *Vict. c.* 38), *ss.* 2, 3, 4—*Public Authorities Protection Act*, 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1.

An action against a police authority to recover compensation under the Riot (Damages) Act, 1886, is not an action "in respect of any alleged neglect or default in the execution of any Act, duty, or authority," within s. 1 of the Public Authorities Protection Act, 1893, and the limitation of time for bringing an action thereby imposed does not apply. KAUFMANN BROTHERS *v.* LIVERPOOL CORPORATION - **Div. Ct. 860**

LOCAL GOVERNMENT — *Buildings—By-Laws —Infringement—Part of Old Building pulled down and New Part erected—"New Building" —Plans of whole Building—Public Health Acts Amendment Act*, 1907 (7 *Edw.* 7, *c.* 53), *s.* 23.

Sect. 23 of the Public Health Acts Amendment Act, 1907, provides as follows: "For the purposes of this Act and the Public Health Acts and any by-laws made thereunder, each of the following operations, namely: (*a*) the re-erection, wholly or partially, of any building of which an outer wall is pulled down or burnt down to or within ten feet of the surface of the ground adjoining the lowest storey of the building . . . . shall be deemed to be the erection of a new building."

A local authority's by-law provided that "Every person who shall intend to erect a building shall give to the council notice in writing of

LOCAL GOVERNMENT—*continued.*

such intention . . . . and shall at the same time deliver or send . . . . complete plans and sections of every floor of such intended building . . . ."

The appellants, the owners of an old building, pulled down part of it, including certain outer walls, leaving the remaining part of the premises standing. The old part of the premises was erected before building by-laws came into existence. The appellants gave notice in writing to the local authority of their intention to erect on the site of the part pulled down a new part, and with that notice they sent plans and sections of the new part, but they gave no notice as to, or plans or sections of, the whole building, that is, the part left standing and the new part:—

Held, that under s. 23 of the Public Health Acts Amendment Act, 1907, the whole building, that is, the old part and the new part, was not to be deemed to be a new building, and therefore the appellants were not bound to send notices as to, and plans and sections of, the whole building to the local authority.

Leonard v. *Hoare & Co.* [1914] 2 K. B. 798 overruled. THE KING *v.* FOOT'S CRAY U. D. C. **C. A. 246**

2. —— *Building — Temporary Building — Contravention of By-laws—Right of Authority to seize and destroy—Notice—Proof—Secondary Evidence—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 157—*Public Health Acts Amendment Act*, 1907 (7 *Edw.* 7, *c.* 53), *s.* 27, *sub-s.* 4.

The general principle that no notice to produce a notice is usually required does not apply to a case in which the notice required to be produced has been served on a third person.

Robinson v. *Brown* (1846) 16 L. J. (C.P.) 46 followed and applied; *Philipson* v. *Chase* (1809) 2 Camp. 110 explained; *Kine* v. *Baumont* (1822) 3 Brod. & B. 288 distinguished.

A structure may be a new building under the Public Health Act, 1875, and at the same time a temporary building under the Public Health Acts Amendment Act, 1907.

A local authority had power, under by-laws made under the Public Health Act, 1875, if any work should be "begun or done" in contravention of the by-laws, to pull down the work after notice to the person by whom the work had been begun or done. A building was constructed in contravention of the by-laws by W. R. A., and, after being set upon wheels, was sold to the plaintiff. The local authority gave notice to the plaintiff to show cause why it should not be pulled down, and, his reply being unsatisfactory, pulled it down. The plaintiff sued for damages. At the trial the local authority sought to prove notice to W. R. A. by secondary evidence, namely, a duplicate notice, only:—

Held, affirming Atkin J., that the duplicate notice was inadmissible, and the local authority, not having proved notice, could not justify under the Public Health Act, 1875; but, reversing Atkin J., that the local authority, having complied with the provisions of the Public Health Acts Amendment Act, 1907, could justify under that Act. ANDREWS *v.* WIRRAL R. D. C. **C. A. 863**

LOCAL GOVERNMENT—*continued.*

3. —— *By-law — Repeal of Statute authorizing By-law—Abrogation of By-law—Norwich Improvement Act*, 1879 (42 *&* 43 *Vict. c.* cxxv.), *s.* 45—*Local Government Act*, 1888 (51 *&* 52 *Vict. c.* 41), *s.* 85.

When a by-law is made under an Act of Parliament, the repeal of the Act abrogates the by-law, unless the by-law is preserved by the repealing Act by means of a saving clause or otherwise. WATSON *v.* WINCH - **Div. Ct. 688**

4. —— *District Council—Knacker's Yard—Licence—Appeal from Grant or Refusal—Knackers Act*, 1786 (26 *Geo.* 3, *c.* 71), *s.* 1—*Towns Improvement Clauses Act*, 1847 (10 *&* 11 *Vict. c.* 34), *ss.* 125, 131—*Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 169—*Public Health Acts Amendment Act*, 1890 (53 *&* 54 *Vict. c.* 59), *ss.* 7, 29—*Local Government Act*, 1894 (56 *&* 57 *Vict. c.* 73), *s.* 27.

A knacker's licence such as was formerly granted by quarter sessions under the Knackers Act, 1786, may now be granted by a district council under s. 29 of the Public Health Acts Amendment Act, 1890.

From a grant or refusal of such a licence by a district council an appeal lies to quarter sessions under s. 7 of the later Act, notwithstanding s. 27, sub-s. 2, of the Local Government Act, 1894. THE KING *v.* ESSEX JJ. *Ex parte* BARKING TOWN U. D. C. - **Div. Ct. 665**

5. —— *Housing—Working Classes—Scheme—Taking of Land compulsorily—Date at which Value is to be assessed—Housing of the Working Classes Act*, 1890 (53 *&* 54 *Vict. c.* 70), *ss.* 7, 20, 21; *Sched. II.*

Where under a scheme made under the Housing of the Working Classes Act, 1890, land is taken compulsorily, the date at which the arbitrator has to ascertain its value is not the date of the advertisement of the scheme under s. 7 of the Act. Whether the proper date for assessing the value is the date of the arbitration or, if a notice to treat has been served, the date of that notice, *quaere.*

Wilkins v. *Birmingham Corporation* (1883) 25 Ch. D. 78 considered. LONDON C. C. *v.* WILSON'S EXECUTORS - - **Atkin J. 837**

—— Public health—Unsound meat - - **425**
See PUBLIC HEALTH. 3.

LONDON—Paving and making up street—Constructing gully to carry off surface water into sewer—Placing grating over gully—Exercise of statutory powers
See NEGLIGENCE. 4. **583**

—— Police.
See POLICE.

LONDON PRODUCE CLEARING HOUSE REGULATIONS 19, 20 - - 939
See SALE OF GOODS. 5.

MAGISTRATES.
See JUSTICES.

MARINE INSURANCE.
See INSURANCE (MARINE).

MARRIAGE—*Breach of Promise—Action against Executor of Promisor—Special Damage—Business given up in Consideration of Promise to marry — Survival of Cause of Action — Actio personalis moritur cum persona.*

The plaintiff brought an action for breach of promise of marriage against the executor of the promisor in which she claimed as special damage loss suffered by her through having given up a profitable business at the request of the deceased and in consideration of his promise to marry her. The jury having found a verdict for the plaintiff :—

Held, that the plaintiff was not entitled to maintain the action.

By Swinfen Eady and Phillimore L.JJ., Pickford L.J. not expressing a decided opinion : There was no corroboration of the plaintiff's evidence as required by s. 2 of 32 & 33 Vict. c. 68.

By Phillimore and Pickford L.JJ. : Assuming that the action would lie to recover special damage, the loss to the plaintiff by reason of her having given up her business was not special damage flowing from the breach, and was therefore not recoverable.

Semble, *per* Swinfen Eady L.J. : An action for breach of promise of marriage will not lie after the death of the promisor to recover special damage.

Judgment of Lush J. [1915] 1 K. B. 798 affirmed. QUIRK *v.* THOMAS (EXECUTOR OF) **C. A. 516**

2. —— *Breach of Promise—Illness of Plaintiff at Date fixed for Marriage — Defence of Illness—Onus of proving that she was fit to marry within a reasonable Time afterwards—Reasonable Ground for believing Plaintiff to be unfit.*

Where the plaintiff in an action for breach of promise of marriage was admittedly in such a state of health on the date fixed for the wedding as to be unfit to marry, and was therefore not ready at that date to marry the defendant, the onus lies upon the plaintiff of proving that she was ready, that is to say, fit, to marry the defendant within a reasonable time thereafter ; but slight evidence is sufficient to discharge this onus.

The fact that the defendant honestly and on reasonable grounds believed that the plaintiff was unfit for marriage is no defence to an action for breach of promise of marriage if the plaintiff was not in fact unfit.

The question whether and in what circumstances illness is a valid excuse for refusal to marry discussed.

Observations on *Hall* v. *Wright* (1859) E. B. & E. 746, 765, by Phillimore L.J. JEFFERSON *v.* PASKELL - - - - - - - **C. A. 57**

MASTER AND SERVANT—Workman receiving compensation for injury—Whether relation of master and servant terminates **906**
See WORKMEN'S COMPENSATION. 15.

MEDICAL ASSESSOR—Function of - - **970**
See WORKMEN'S COMPENSATION. 14.

MINERALS COMPRISED IN A MINING LEASE —Revenue — Increment value duty — Lease for term not exceeding fourteen years—Exemption from duty - **882**
See REVENUE. 3.

MINE—*Coal mine—Mine not managed in Conformity with Act—Liability of Owner—Taking Part in Management of Mine—Coal Mines Act*, 1911 (1 & 2 *Geo.* 5, *c.* 50), *s.* 31, *sub-s.* 3 ; *s.* 101, *sub-s.* 2 ; *s.* 102, *sub-s.* 1 (*a*).

By s. 2, sub-s. 1, of the Coal Mines Act, 1911, "Every mine shall be under one manager, who shall be responsible for the control, management, and direction of the mine."

By s. 31, sub-s. 3, "After the first day of January, 1913, or such later date as, in view of the circumstances of the mine, may be fixed by the inspector of the division, there shall, in every mine in which a mechanical contrivance for ventilation is used, be provided and maintained in a condition to be put into immediate operation adequate means for reversing the air current."

By s. 101, sub-s. 2, "If a mine is not managed in conformity with this Act, the owner . . . . thereof shall . . . . be deemed to be guilty of an offence against this Act."

By s. 102, sub-s. 1, "Where proceedings are taken under this Act against the owner . . . . the owner . . . . shall not be liable to any penalty, if he proves" (inter alia) "that he . . . . did not in respect of the matters in question take any part in the management of the mine."

The owners of a mine to which s. 31, sub-s. 3, applied instructed their manager to apply to the inspector of the division for an extension of time in which to comply with the requirements of that section, and the inspector allowed the extension. The manager consulted the owners as to the scheme to be adopted for the purpose of satisfying those requirements. Save as aforesaid, the owners took no part in the management of the mine. On the expiry of the time as so extended, the scheme which had been adopted was uncompleted, and the mine was still without adequate means for reversing the air current. The owners having been summoned under s. 101, sub-s. 2 :—

Held by Ridley and Avory JJ., Lush J. dissenting, that they had taken part in the management of the mine in respect of the matters in question and could not claim the protection of s. 102, sub-s. 1, and were consequently guilty of the offence charged. ATKINSON *v.* LEWIS MERTHYR CONSOLIDATED COLLIERIES, LD. **Div. Ct. 363**

2. —— *Mining Lease—Subsequent Grant of Building Lease, with Reservation of Mines—Compensation for Injury caused by Mining—Subsidence of Surface — Liability of Mining Lessees and Lessor to Building Lessee.*

In 1896 Lord D. granted a lease of the coal under certain land for fifty years. By that lease, which at all material times was vested in the defendant colliery company, the coal was to be

MINE—*continued.*

worked according to the best and most approved mode of working similar mines in the district. In 1909 Lord D. granted a lease to the plaintiff for ninety-nine years of a plot of land (under which the mining rights had been granted by the lease of 1896) together with the two houses to be erected thereon. That lease contained a covenant for quiet enjoyment, and by a schedule attached all the coal under the demised plot was excepted and reserved, liberty being reserved to the owner and his agents and lessees to work the said coal, "reasonable recompense and satisfaction being made for any injury done to the said demised premises by reason of the exercise of any of the rights aforesaid whether by letting down the surface or otherwise." In 1910 the plaintiff erected two houses on the demised plot, and in 1911 they were damaged by subsidence owing to the working of the subjacent coal by the defendant colliery company. In an action by the plaintiff against the colliery company and Lord D. claiming in respect of the damage done to the houses, the judge found as a fact that for the last fifty years collieries in the district had worked on the long-wall system, and that it had been common mining knowledge for at least forty years that under that system the surface necessarily and inevitably subsided as a result of the working:—

Held, (1.) applying *Butterley Co.* v. *New Hucknall Colliery Co.* [1910] A. C. 381, that the co liery company were not liable to the plaintiff, inasmuch as, being entitled to work, and having in fact worked, the coal in the mode universally used in the district, namely, the long-wall system, leave to cause subsidence was clearly implied; but (2.) that Lord D. was liable (*a*) on the ground that the provision in the schedule attached to the plaintiff's lease as to making reasonable recompense and satisfaction for injury done to the demised land by mining operations was a covenant by Lord D. that he would make or cause to be made recompense and satisfaction, if injury was done either by himself or his lessees, even where his lessees acquired their title before the lease to the plaintiff, and (*b*) on the ground that Lord D. could not derogate from his own grant.

As to the true limits and extent of the covenant for quiet enjoyment, *quaere*. JONES *v* CONSOLIDATED ANTHRACITE COLLIERIES, LD. AND LORD DYNEVOR - - Scrutton J. 123

MOTOR — Negligence — Liability — Intervening act of third party—Highway—Motor left unattended - - - - - 148
See NEGLIGENCE. 3.

NATIONAL INSURANCE.
See INSURANCE (NATIONAL).

NATURALIZED BRITISH SUBJECT — Internment - - - - - - - 738
See DEFENCE OF THE REALM.

NEGLIGENCE — Admission of negligence — County court—Payment into Court—Notice denying liability - - 159
See COUNTY COURT, 3.

NEGLIGENCE—*continued.*

2. —— Highway—Nuisance—Repair of gas main—Dangerous act—Fire and molten lead on land adjacent to highway—Injury to child - - - - - 33
See NUISANCE. 1.

3. —— *Liability—Intervening Act of Third Party—Highway—Motor left unattended.*

A person lawfully leaving his property unattended in a highway must take reasonable means to prevent such mischief as he ought to contemplate as likely to arise from his user of the highway. He is not liable for damage caused by his property through such interference of third persons as he is not bound to anticipate.

The defendants' servants momentarily left stationary but unattended in a highway a steam motor lorry. In order to start the lorry it was necessary to withdraw a hand-pin from the gear lever and then to move that and two other levers. Two soldiers seeing the lorry mounted it. One tried but failed to set it in motion. The other succeeded in starting it backwards so that it ran into the plaintiff's shop front and did damage for which the action was brought:—

Held, that there was in the circumstances no evidence of negligence in leaving the lorry unattended; and, secondly, assuming that there was negligence, that there was no evidence that it caused the damage. RUOFF *v.* LONG & CO.
Div. Ct. 148

4. —— *London — Paving and making up Street—Constructing Gully to carry off Surface Water into Sewer—Placing Grating over Gully—Exercise of Statutory Powers—Work carried out with Reasonable Care and Skill—Grating as laid being dangerous to Cyclists—Liability of Local Authority for Nuisance — Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 105.

A local authority in 1883, acting under s. 105 of the Metropolis Management Act, 1855, paved and made up a road, and for the purpose of carrying away the surface water they constructed a gully near the side of the road leading into a subjacent sewer, and covered the hole with a grating. The grating and framework were so laid as to cause a considerable depression in the road, but the work was done with due care and skill in accordance with the usual method at the time. In 1912 the plaintiff was riding a bicycle along the road, when in passing over the grating she was, in consequence of the depression in the road, thrown from her bicycle and injured. In an action against the local authority to recover damages for the injuries so sustained, the jury found that the grating, by reason of the excessive depression in the original construction, was dangerous to a careful cyclist, but that the local authority were not negligent in not having discovered the defect:—

Held, that, as the local authority, in the execution of their statutory powers, had exercised due care and skill in the original construction of the grating, and as they were not negligent in not having discovered the danger, they were not liable though the work turned out subsequently to be dangerous. PAPWORTH *v.* BATTERSEA CORPORATION (No. 2) - - C. A. 583

NOTICE—County court—Payment into Court—Notice denying liability - - 159
See COUNTY COURT. 3.

—— Employer and workman — Compensation—Accident—Notice of accident 180
See WORKMEN'S COMPENSATION. 3.

—— Proof—Secondary evidence—Public health—New building—Temporary building—Contravention of by-laws—Right of authority to seize and destroy - 863
See LOCAL GOVERNMENT. 2.

NUISANCE — *Highway — Negligence — Repair of Gas Main—Dangerous Act—Fire and Molten Lead on Land adjacent to Highway—Injury to Child.*

Workmen employed by the defendants, a gas company, for the purpose of carrying out repairs to a gas main in a highway placed a fire pail, on which was a ladle containing molten lead, on unenclosed land adjacent to the highway. The plaintiff, a young child, was playing with other children near the fire, when a passer-by accidentally knocked over the fire pail, and the molten lead was spilled on the plaintiff, causing her injury. In an action by the plaintiff to recover damages the county court judge found that the defendants were guilty of negligence in leaving the fire unattended and unguarded with the knowledge that it was surrounded by children and that it was being used for molten lead :—

Held, that there was evidence on which the county court judge could find that the defendants were negligent ; and that the defendants were also liable on the ground that what they were doing was a nuisance in that it was dangerous, unless precautions were taken to guard persons using the highway from the danger. CRANE *v.* SOUTH SUBURBAN GAS CO. - - Div. Ct. 33

2. —— *Highway—Sheep straying on Highway—Damage to Vehicle using Highway.*

While the plaintiffs' motor car was being driven along a highway in the daylight at a rate of sixteen to twenty miles an hour, the driver saw in front of him on the road a number of sheep unattended ; he put on his brakes, and almost immediately thereafter two sheep, which had apparently been left behind by the others, jumped from the bank on the near side, and one of them ran in front of the car and broke part of the steering gear, in consequence of which the driver lost control, and the car ran into the bank and was damaged. The sheep were the property of the defendant, who was subsequently prosecuted and fined under s. 25 of the Highway Act, 1864, for having allowed them to stray on the highway. In an action against the defendant by the plaintiffs in respect of the damage to the car, the county court judge found that the sheep escaped on to the highway from the defendant's field owing to a defective hedge ; that it is the natural tendency of sheep which are untended to run across or otherwise endanger vehicles in a road ; that it is a matter of common knowledge that when sheep find themselves separated from the bulk of the flock, they have almost a mania for rejoining it, and are perfectly regardless of intervening traffic ; that the defendant had been guilty of negligence, or had committed a nuisance, in allowing the sheep to stray on to the highway ; and that the accident was the natural consequence thereof. He accordingly held that the defendant was liable. On appeal :—

Held, allowing the appeal, that even assuming that there was evidence of negligence or of a nuisance committed by the defendant in allowing the sheep to stray on to the highway, yet, there being no evidence of "a vicious or mischievous propensity" on the part of the sheep within the meaning of the decided cases, the accident was not the direct and natural consequence of such negligence or nuisance.

Cox v. *Burbidge* (1863) 13 C. B. (N.S.) 430 applied.

Semble (*per* Lush J.) : If sheep were allowed to stray through defective fencing and be on the road at night, and the driver of a cart or motor car, driving with due regard to all such possible risks, were to run against them in the dark, the negligent owner of the sheep might be liable. HEATH'S GARAGE, LD. *v.* HODGES - Div. Ct. 206

OFFENCE—Sunday observance—Purchase from refreshment house keeper on Sunday—Aiding and abetting commission of offence - - - - - - 218
See SUNDAY OBSERVANCE.

ORDER IN COUNCIL—Internment of British subject - - - - - - 738
See DEFENCE OF THE REALM.

PANEL DOCTOR—Extravagant prescriptions—Power of insurance committee to surcharge doctor - - - - - 331
See INSURANCE (NATIONAL). 2.

PARTNER—Alien enemy—Outbreak of war—Dissolution of partnership - 763
See ALIEN ENEMY. 4.

PAYMENT INTO COURT—County court—Practice—Notice denying liability—Action of negligence—Admission of negligence—Denial of damage—Form of notice - - - - - - 159
See COUNTY COURT. 3.

PLEA OF AUTREFOIS CONVICT - - 443
See CRIMINAL LAW. 1.

POLICE—*Special Constable—Power of Commissioner of Metropolitan Police to dismiss—Special Constables Act*, 1831 (1 & 2 *Will.* 4, *c.* 41), *ss.* 4, 9, 10—*Police Act*, 1839 (2 & 3 *Vict. c.* 93), *s.* 6—*Special Constables Act*, 1914 (4 & 5 *Geo.* 5, *c.* 61), *s.* 1, *sub-s.* 1—*Special Constables Order*, 1914, *Regulations* 5, 6, *and Schedule.*

By s. 1, sub-s. 1, of the Special Constables Act, 1914, "His Majesty may, by Order in Council, make regulations with respect to the appointment and position of special constables appointed during the present war under the Special Constables Act, 1831, ... and may, by those regulations, provide (inter alia) . . . . (*c*) for the application to special constables to which the regulations apply of any of the

OLICE—*continued.*
provisions of the Police Acts, 1839 to 1910, ... subject to such modifications as may be specified in the regulations . . . .." By s. 6 of the Police Act, 1839, the chief constable may at his pleasure dismiss all or any of the other constables to be appointed for the county.

Regulations known as "The Special Constables Order, 1914," were made under the Act. By regulation 6 the chief officer of police may at his pleasure dismiss any special constable :—

Held, that the regulation was not ultra vires, inasmuch as upon the true construction of the word "position" in s. 1, sub-s. 1, of the Act of 1914—viewed in the light of the power of dismissal by the chief constable contained in s. 6 of the Police Act, 1839, which is applied with the necessary modifications by clause (*c*)—it was the intention of the Legislature to confer the power to make regulations not only with respect to the position of special constables while they hold that office, but also with respect to the determination of the office.

Held, therefore, that the Commissioner of Metropolitan Police (who is by the schedule to the Order the "chief officer of police" for the Metropolitan Police District) has the power to dismiss a metropolitan special constable.

Per Lush J.: Even without the aid of clause (*c*) the words in s. 1, sub-s. 1, of the Act of 1914 conferring power to make regulations with regard to the "appointment and position" of special constables would in their natural meaning include a power to make regulations with respect to the termination of the office of a special constable. METROPOLITAN POLICE COMMR. *v.* HANCOCK - **Div. Ct. 190**

PORT — Ship — Charterparty — Employment of ship between "safe ports"—What is a "safe port" - - - - - **138**
See SHIPPING. 4.

PRACTICE—County court.
See COUNTY COURT.

—— Third party.
See THIRD PARTY.

PRACTICE AND PROCEDURE.
See APPEAL.

"**PRESERVED CREAM**"—Cream mixed with boric acid - - - - - - **878**
See ADULTERATION.

PRINCIPAL AND SURETY—*Bond for due Performance of Contract — Litigation between Parties to Contract—Contractor ordered to pay Costs—Liability of Surety.*

A contractor entered into a contract with the plaintiffs for the execution by him of certain works. The contract did not contain any agreement by the contractor that, in the event of litigation arising between him and the plaintiffs in connection with the performance of the contract and of his failing in that litigation, and being ordered to pay the costs, he would pay them. The defendants, as sureties for the contractor, gave a bond to the plaintiffs conditioned for the due performance by the

PRINCIPAL AND SURETY—*continued.*
contractor of his contract. Litigation having arisen between the plaintiffs and the contractor as to the performance of the contract, judgment was given against the contractor and he was ordered to pay the costs. The plaintiffs sued the defendants on their bond for the amount of the costs :—

Held, that, as the liability of the contractor to pay the costs arose not under the contract but under the judgment, the defendants were not liable. HOOLE URBAN DISTRICT COUNCIL *v.* FIDELITY AND DEPOSIT COMPANY OF MARYLAND - - - - - - **Bailhache J. 25**

PRIVITY OF CONTRACT—Tender—Closed contract—"Party to the contract"—Sale of sugar—Right to appeal to council of Sugar Association for a decision—Duty of council on such appeal - - **939**
See SALE OF GOODS. 5.

PRIVY COUNCILLOR — Alien — Naturalization —Qualification— Quo warranto - **595**
See ALIEN.

PROOF—Workmen's compensation—Evidence —Burden of proof - - - **180**
See WORKMEN'S COMPENSATION. 3.

PUBLIC AUTHORITIES' PROTECTION—Limitation of action—Claim for compensation
See LIMITATIONS, STATUTES OF. **860**

PUBLIC HEALTH—Buildings—By-laws - **246**
See LOCAL GOVERNMENT. 1.

—— Rates.
See RATES.

3. —— *Unsound Meat—Meat being carried in a Cart—"Deposited in any place"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 116.

Unsound meat intended for the food of man was being carried in a cart along a road from a knacker's yard, where it had been partially prepared for sale, to a slaughter-house, where it was to be further prepared for sale. While on its way to the slaughter-house it was seized by an inspector of nuisances under s. 116 of the Public Health Act, 1875 :—

Held, that the meat was deposited in a place for the purpose of preparation for sale within the meaning of that section. WILLIAMS *v.* ALLEN - - - - - - **Div. Ct. 425**

QUO WARRANTO — Alien — Naturalization — Privy Councillor—Qualification - **595**
See ALIEN.

RAILWAY—*Regulation—Demurrage on Trucks —Receiver of Goods—Privity of Contract—Computation of Time for unloading—Railway Rates and Charges No.* 10 (*Lancashire and Yorkshire Railway, &c.*) *Order Confirmation Act*, 1892 (55 & 56 *Vict. c. xlviii.*), *Schedule*, *s.* 5, *sub-s.* 4.

A Railway Act empowered the railway company to charge traders a reasonable sum by way of addition to the tonnage rate for, inter alia,

RAILWAY—*continued.*
the detention of trucks beyond such period as should be reasonably necessary for enabling the consignee to take delivery thereof.

Two truckloads of goods arrived by rail at the plaintiffs' station on a Friday consigned to a certain person who gave notice to the plaintiffs to transfer the goods to the defendant. An advice note was sent on the same day to the defendant stating that demurrage would be charged at a specified rate per wagon per day or part of a day, if the goods were not unloaded and removed within forty-eight hours after the despatch of the notice, and that the defendant was to send for the goods not later than 6 P.M., and on Saturdays not later than 1 P.M. The defendant received the notice on the Saturday, and the unloading of the trucks was proceeded with up to 1 P.M. on that day and on Monday and was finished on Tuesday. The plaintiffs claimed demurrage in respect of the detention of one of the trucks on the Tuesday:—

Held, that the receipt and acceptance of the advice note by the defendant constituted privity of contract between the plaintiffs and the defendant; that in calculating the period of forty-eight hours the whole of each day, excluding Sunday but including the time after 1 P.M. on Saturday, was to be counted; and that the defendant was, therefore, liable for the demurrage claimed. LANCASHIRE AND YORKSHIRE RY. CO. *v.* SWANN - **Lord Coleridge J. 263**

RATES—*General District Rate—Occupation of Land—"Land covered with water"—Graving Docks—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*b*).

Graving docks which are used for the examining and repairing of ships, and into which water is usually admitted only when it is necessary to float ships into or out of them, are not "land covered with water" within the meaning of that expression in s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875.

Where land is sometimes covered with water for the purposes of its use, and sometimes not, it is a question of degree whether upon the facts it can be said to be "land covered with water" within the meaning of the section or not.

Decision of Scrutton J. [1915] 2 K. B. 312 affirmed. MERSEY DOCKS AND HARBOUR BOARD *v.* BIRKENHEAD CORPORATION - - **C. A. 695**

2. —— *Non-payment of—Application to enforce Rate — Jurisdiction of Justices to hear and determine Defences — Exemption — "Parochial Rates"—General District Rate—Thames Conservancy Act*, 1894 (57 & 58 *Vict. c. clxxxvii.*), *s.* 289—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 211, 256.

By s. 289 of the Thames Conservancy Act, 1894, all lands and buildings "vested in the conservators in respect of the Thames above London Bridge shall be exempt from all parochial charges, rates, taxes, assessments, impositions and payments whatsoever."

A house and grounds, which were vested in the conservators, were let by them at a rent to a tenant who was not one of their officials. The house and grounds were not used for any purpose

RATES—*continued.*
in connection with the navigation or conservancy of the Thames. The tenant was assessed to the poor rate and general district rate in respect of the house and grounds. Upon a summons before justices for an order for payment of the rates:—

Held, (1.) that the house and grounds were exempt from the poor rate; (2.) that though the exemption in s. 289 did not in itself extend to the general district rate, which was not a parochial rate, yet, inasmuch as by s. 211, sub-s. 1, of the Public Health Act, 1875, the general district rate was to be made and levied on the occupier of property "for the time being by law assessable to any rate for the relief of the poor," it necessarily followed from the exemption in respect of the poor rate that the house and grounds were also exempt from the general district rate.

Upon an application to a Court of summary jurisdiction for an order for payment of a general district rate under s. 256 of the Public Health Act, 1875, the Court has jurisdiction to entertain the question whether the occupier is exempt under the provisions of a public Act from being rated, the facts not being in dispute.

Dictum of Bowen L.J. in *Reg.* v. *Hannam* (1886) 34 W. R. 355 approved and followed.

Per Swinfen Eady and Pickford L.JJ.: Upon such an application the justices have jurisdiction to hear and determine any defence alleging that the defendant ought not to have been rated at all, or that, if he was rateable at all, he ought not to have been rated upon the full rateable value, when the material facts are not in dispute.

Decision of the Divisional Court [1915] 1 K. B. 548 varied. WHENMAN *v.* CLARK **C. A. 94**

RE-ENTRY - - - - - - - **646**
See LANDLORD AND TENANT.

REFRESHMENT HOUSE KEEPER — Sunday observance — Purchase from refreshment house keeper on Sunday—Aiding and abetting commission of offence **218**
See SUNDAY OBSERVANCE.

RENT—Alien enemy—Liability for rent—Contract—Implied basis of - - - **20**
See ALIEN ENEMY. 2.

REPAIR—Liability to—Landlord and tenant—Flat—Landlord retaining possession of roof—Negligence—Absolute liability
See LANDLORD AND TENANT. **646**

REQUISITION BY ADMIRALTY - - **726**
See SHIPPING. 9.

RESTRAINT OF PRINCES - - **485, 675**
See SHIPPING. 5, 8.

REVENUE—*Carriage—Licence—Expiration of Period allowed for paying Duty—Person summoned for keeping Carriage on Day within that Period—Revenue Act*, 1869 (32 & 33 *Vict. c.* 14), *ss.* 18, 22, 27.

Sect. 18 of the Revenue Act, 1869, provides for a licence being taken out annually by every person who keeps a carriage. Sect. 22 requires

REVENUE—*continued.*
such person to pay the duty for which he is liable before the expiration of the month of January in each year, or before the expiration of twenty-one days from the day of his commencing to keep or use the carriage. Sect. 27 imposes a penalty for failure to pay the duty and obtain the proper licence within the time prescribed by the Act:—

Held, that if a person fails to take out a licence within the periods allowed by s. 22 for payment of the duty, he can thereafter be summoned and made liable to the penalty imposed by s. 27 for having kept a carriage without a licence on a date within those periods. SLY *v.* RANDALL - - - - - - **Div. Ct. 710**

2. —— *Income Tax—Deduction—Covenant—Annual Payment — Permanent Maintenance — "Free of income tax"—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *ss.* 102, 103—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 40.

By an order made by consent by the President of the Divorce Division after a decree absolute for the dissolution of the plaintiff's marriage with the defendant, the defendant was ordered to pay to the plaintiff permanent maintenance at the rate of 62*l.* 10*s.* per quarter "free of income tax"; and by a deed of the same date, which recited the order, the defendant covenanted to pay to the plaintiff "during her life the quarterly sum of 62*l.* 10*s.* (free of income tax)." The plaintiff sued the defendant to recover the amount of the income tax on one quarter's payment which the defendant had deducted:—

Held, that the covenant to pay the quarterly sum "free of income tax" was void under s. 103 of the Income Tax Act, 1842, and that the defendant was therefore entitled to make the deduction.

In re Barry's Trusts [1906] 1 Ch. 768; [1906] 2 Ch. 358, followed. BLOUNT *v.* BLOUNT **Scrutton J. 230**

3. —— *Increment Value Duty — Minerals comprised in a Mining Lease—Lease for Term not exceeding Fourteen Years—Exemption from Duty—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 1, 22.

Increment value duty is, under s. 22 of the Finance (1909-10) Act, 1910, chargeable upon minerals comprised in a mining lease even if the lease is for a term not exceeding fourteen years.

Decision of Rowlatt J. [1915] 1 K. B. 725 affirmed (dissentiente Phillimore L.J.). INLAND REV. COMMRS. *v.* SHEFFIELD AND SOUTH YORKSHIRE NAVIGATION CO. - - **C. A. 882**

4. —— *Stamp—Bond, Covenant, or Instrument—Money payable on Contingency—Annuity — Half-yearly Payments — Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *Sched. I.*

By a deed executed by them the Underground Company agreed, provided a sufficient number of the holders of ordinary stock of the Central London Railway Company would take guaranteed stock in exchange for their ordinary stock, to guarantee interest at 4 per cent. per annum on such guaranteed stock, payable half-yearly, if and to the extent that the profits of the Central London Railway Company were not sufficient to pay that amount of interest. At the date of the deed it was not known whether a sufficient number of holders of ordinary stock would accede to the arrangement or whether all would so accede, but if they all acceded and if the Central London Railway Company made no profits in any year, the appellants would be liable to pay 120,000*l.* in that year, being 4 per cent. on 3,000,000*l.* stock:—

Held, (1.) that the deed was chargeable with ad valorem stamp duty under the heading "Bond, Covenant, or Instrument of any kind whatsoever, being the only or principal or primary security for any annuity . . . . or for any sum or sums of money, at stated periods . . . . for . . . . [an] indefinite period," on the maximum sum which might become payable under the deed; and (2.) that the amount on which the duty was chargeable was the yearly sum that might be payable, namely, 120,000*l.*, notwithstanding that it was payable at half-yearly periods.

Decision of Scrutton J. [1914] 3 K. B. 210 affirmed. UNDERGROUND ELECTRIC RYS. CO. OF LONDON AND OTHERS *v.* INLAND REV. COMMRS. - - - - - - **C. A. 306**

5. —— *Stamp Duty — Medicine—"Held out or recommended to the public"—"Entire" Drug —Medicines Stamp Act*, 1812 (52 *Geo.* 3, *c.* 150), *Schedule.*

The appellants, wholesale chemists, issued a price list of drugs to retail chemists, but not to the public generally. They sold to a person, who produced an order purporting to come from a retail chemist, a bottle of tablets of a drug described and priced in their list which was not stamped for the duty chargeable under the Medicines Stamp Act, 1812. The list contained a recommendation of their preparations and stated that medical literature and advertising matter would be supplied on application, and it described the use of the drug. The drug was mixed with starch and milk sugar, but the milk sugar did not affect the medicinal quality of the drug, and the starch had no medicinal effect:—

Held, that there was evidence that the appellants had by advertisement or printed papers held out or recommended the drug to the public as beneficial for human ailments, and that it was not "entire without any mixture or composition with any other drug or ingredient," within the meaning of the schedule to the Medicines Stamp Act, 1812. KNOLL *v.* RENSHAW - - - - - - - **Div. Ct. 700**

REVIEW — Employer and workman — Compensation — Termination — Incapacity arising from accident — Concurrent causes - - - - - - **172**
See WORKMEN'S COMPENSATION. 8.

RIOT—Claim for compensation for damage by—Public authorities' protection—Limitation of action - - - - **860**
See LIMITATIONS, STATUTES OF.

RULES OF SUGAR ASSOCIATION OF LONDON, rule 491B - - - - - 939
See SALE OF GOODS. 5.

RULES OF THE SUPREME COURT, 1883, Order LIV., r. 23: MILLER, GIBB & CO. *v.* SMITH & TYRER, LD.
Div. Ct. [1916] 1 K. B. 419

SALE—Sugar—Contract - - - - 939
See SALE OF GOODS. 5.

SALE OF GOODS—*C.i.f. Contract—Payment against Shipping Documents—Outbreak of War before Tender of Documents—Seizure by Enemy of British Ship in which Goods carried—Place of Destination an Allied Port—Impossibility of Performance of Contract — Whether Buyers bound to accept Documents.*

By a contract of sale made in June, 1914, the sellers sold to the buyers about 10,000 cases of bean oil shipped afloat from an Oriental port by steamer or steamers, direct or indirect, and with or without transhipment, at the price therein named, cost, freight, and insurance to Antwerp. The buyers were to pay the full amount of provisional invoice made out on net shipping weights by cash without discount against shipping documents on or before arrival of steamer or steamers in Antwerp or three months after notice of arrival of documents in London, whichever might happen first. In July, 1914, the sellers declared to the buyers in part fulfilment of the contract 3000 cases of bean oil which had been shipped on the *Glenearn*, a British vessel, for Antwerp, and rendered to the buyers provisional invoices showing the amount due computed in accordance with the contract. Early on August 4, 1914, war broke out between Belgium and Germany, and the following midnight between Great Britain and Germany. On August 5, 1914, the sellers notified the buyers in writing that the documents relating to the 3000 cases had arrived in London and asked for payment on August 27 in accordance with the contract. On August 18, 1914, the sellers tendered the shipping documents to the buyers. At that date Antwerp was still in possession of the Belgians. The ship had since war broke out been seized by the Germans and detained at Hamburg. The buyers did not take up the documents and contended that they were discharged from their obligation to do so by reason of the seizure of the ship by the Germans :—

Held, that as between the buyers and sellers there was no illegality in tendering documents calling for delivery at Antwerp, which at that time had not fallen. Nor was there any illegality in calling upon the shipowner to deliver at Antwerp, for if he could have got his ship there, it would have been perfectly legal to do so, and the fact that it had become impossible did not prevent the tender of the documents from being valid.

Held, therefore, that the buyers were not discharged from their obligation to take up the documents. *In re* AN ARBITRATION BETWEEN WEIS & CO. AND CRÉDIT COLONIAL ET COMMERCIAL (ANTWERP) - **Bailhache J. 346**

SALE OF GOODS—*continued.*

2. —— *C.i.f. Contract — Payment against Tender of Shipping Documents—Outbreak of War while Contract still executory—Effect of War on Contract—Whether Buyer bound to accept Documents.*

At the date of the tender to the buyers of shipping documents under c.i.f. contracts those documents must be valid and effective.

Two c.i.f. contracts for the sale of beans to be shipped from Chinese ports to Naples and Rotterdam respectively each contained a provision that payment was to be in net cash in London on arrival of the goods at port of discharge in exchange for bills of lading and policies of insurance, but payment was to be made in no case later than three months from date of bills of lading or upon the posting of the vessel at Lloyd's as a total loss. The beans were shipped in July, 1914, on German vessels which on the outbreak of war between England and Germany on August 4, 1914, entered ports of refuge in the East, where they remained. At the expiration of three months from the date of the bills of lading the sellers tendered to the buyers the shipping documents, in one case a German bill of lading and an English policy of insurance, and in the other a German bill of lading and a German policy of insurance. The buyers in each case refused to accept the tender and pay the price:—

Held, affirming the decision of Scrutton J. [1915] 2 K. B. 379, that the buyers were entitled to refuse the tender, inasmuch as at the date of tender the documents had, by considerations of public policy, become void and unenforceable as regards any obligations of performance after the outbreak of war, and to carry out their original obligations would involve entering into contractual relations with the King's enemies.

Opinion of Scrutton J. that a c.i.f. sale is not a sale of goods, but a sale of documents relating to goods, disapproved of by Bankes L.J. and Warrington L.J. ARNHOLD KARBERG & CO. *v.* BLYTHE, GREEN, JOURDAIN & CO. THEODOR SCHNEIDER & CO. *v.* BURGETT & NEWSAM
C. A. 495

3. —— *Contract — Alien Enemy — British Mine Owner—Sale of Zinc Concentrates to Subjects of Germany resident there—Sale of whole Production of Concentrates—Prohibition against selling to other Persons—Outbreak of War—Illegality of Contract.*

By a contract made in 1908, as varied and extended by a contract made in 1910, the plaintiffs, a company incorporated in England, agreed to sell and the defendants, who resided and carried on business in Germany, agreed to purchase during each of the ten years 1910 to 1919, both inclusive, the whole of the plaintiffs' production of zinc concentrates at their mine in Australia, such production not to be less than 85,000 tons nor more than 95,000 tons in each year; and the plaintiffs were prohibited, so long as the contract should be in force, from selling any zinc concentrates to any person other than the defendants, who were entitled at any time to leave 2200 tons of concentrates on the

SALE OF GOODS—*continued.*

plaintiffs' floors and 800 tons in their vats at the plaintiffs' expense. By clause 17 of the contract of 1908 it was provided that in the event of (inter alia) any strike, suspension of labour, floods, fire, stoppage of water supply, acts of God, force majeure, or any cause beyond the control of either the sellers or the buyers preventing or delaying the carrying out of the contract, "then this agreement shall be suspended during the continuance of any and every such disability." War was not specified as a cause of suspension. The contract contained various provisions as to notices being given, as to fixing the price of and the method and time of payment for the concentrates, as to weighing, sampling, and assaying the concentrates, and as to other matters. On the outbreak of war between Great Britain and Germany on August 4, 1914, the defendants became alien enemies. In an action for a declaration that the contract was dissolved by the existence of the war:—

Held by the Court of Appeal, that, assuming that war was a cause of suspension within clause 17 of the contract of 1908, the suspension was only of deliveries of concentrates, and not of the whole contract, and that the effect of the prohibition against selling to any person other than the defendants was to prevent the plaintiffs from using their resources for the benefit of this country; that therefore the further performance of the contract after the outbreak of war became illegal as being detrimental to the interests of the country and of assistance to the King's enemies; and that the contract was dissolved.

Held, also, by Swinfen Eady and Phillimore L.JJ. (Pickford L.J. not dissenting), affirming the decision of Bray J., that the continued existence of the contract would involve commercial intercourse with the enemy, and upon that ground also the agreement had become illegal and was dissolved.

Semble, per Bray J.: Neither the expression "force majeure" in clause 17 of the contract of 1908 nor the general words at the end of the clause included war as a cause of suspension. ZINC CORPORATION, LD. *v.* HIRSCH - **C. A. 541**

4. —— *Contract — Declaration of War — Embargo on Exportation — Illegality—Impossibility of Performance—Temporary Suspension—Reasonable Time.*

In July, 1914, the plaintiffs agreed to supply the defendants with confectionery for export. War against Germany was declared on August 4. By Proclamations of August 5 and 10 the exportation of confectionery was forbidden. The plaintiffs repudiated the contract and brought an action for the value of goods sold and delivered by them to the defendants. The defendants counterclaimed for breach of contract, and there was a plea to the counter-claim that the contract had been dissolved by the embargo declared by the Proclamations. On August 20 the prohibition of exportation of confectionery was removed:—

Held, reversing the decision of Rowlatt J. [1915] W. N. 116, that this was not a case of trading with the enemy, and the contracts had not been annulled but suspended. The plaintiffs should have waited a reasonable time before repudiating the contract, and the defendants were entitled to recover on their counter-claim. ANDREW MILLAR & CO., LD. *v.* TAYLOR & CO., LD. - - - - - - **C. A. 402**

5. —— *Contract — Sale of Sugar — London Produce Clearing House Regulations* 19, 20—*Rules of Sugar Association of London, rule* 491B—*Privity of Contract—Tender—Closed Contract*—"*Party to the contract*"—*Right to appeal to Council of Sugar Association for a Decision—Duty of Council on such Appeal.*

By a contract made in July, 1914, the plaintiff, who carried on business in England, purchased 1000 bags of beetroot sugar f.o.b. Hamburg, August delivery. The contract was expressed to be in accordance with the rules and regulations of the Sugar Association of London and subject to the regulations of the London Produce Clearing House, Limited. It contained a clause that "this contract shall be forthwith registered with the London Produce Clearing House, Limited, and subject to its regulations when so registered shall take effect as if the respective parties hereto had contracted with the London Produce Clearing House, Limited, instead of each other, and upon such registration all liability of the parties to this contract to each other shall cease." The contract was registered with the Clearing House.

By regulations 19 and 20 of the Clearing House every buyer shall be bound to accept in fulfilment of his contract any tender either passed on to him by the Clearing House or made to him direct on behalf of the Clearing House by a seller duly authorized by the Clearing House to do so, and the Clearing House may put the tenderer and receiver into direct communication, in which case all declarations, notices, the delivery of documents, and payment of invoice shall pass between tenderer and receiver direct. By rule 491A of the rules of the Sugar Association of London, in the event of Germany being involved in war with England the contract, unless previously closed, shall be deemed to be closed on certain terms. By rule 491B, "For the purposes of the war clause a contract against which a tender has been made shall be deemed a closed contract. Should the state of war prevent shipment or warehousing and/or passing of documents, then any party to the contract shall be entitled to appeal to the council [of the Association] for a decision which shall be binding on all concerned."

On July 31, 1914, the German Government placed an embargo on the export of sugar from Germany. On August 1 the Clearing House tendered to the plaintiff in fulfilment of his contract 1000 bags of sugar identified by marks and numbers. These bags were part of a larger number of bags of sugar which the defendants, who carried on business in London, on May 1, 1914, had sold to other purchasers for August delivery on the same terms as those contained in the plaintiff's contract, and this contract was registered with the Clearing House. The sugar was at the time of tender in the free port of

SALE OF GOODS—*continued.*
Hamburg. On August 4 war was declared between Great Britain and Germany, and on a subsequent date in August the Clearing House disclosed to the plaintiff the names of the defendants as the sellers of the sugar, and put them into direct communication with each other in accordance with regulations 19 and 20. The plaintiff declined to carry out the contract on the ground that it would be illegal to do so after the declaration of war. The defendants appealed to the council for relief under rule 491B and asked the council to fix a price at which the sugar should be invoiced back to them. In an action by the plaintiff for a declaration that he was released from the contract and for an injunction to restrain the defendants from proceeding with any appeal to the council:—

Held, that there was no privity of contract between the plaintiff and the defendants, the contract remaining one between the plaintiff and the Clearing House, and that therefore the defendants were not a "party to the contract" with the plaintiff within the meaning of rule 491B, and were not entitled to appeal to the council for a decision; and that the further performance of the contract became illegal on the outbreak of war as it would have involved commercial intercourse with the enemy.

Held, also, that the tender of the sugar was a valid tender under the rules notwithstanding the embargo, and that the sugar was at the time of tender "free of Customs formalities."

Under rule 491B the council, upon an appeal to them by a party to a contract, can only decide according to the legal rights of the parties, and are not entitled to decide what in their opinion is fair and reasonable to be done as between the parties in the circumstances.

The obtaining of an award under rule 491B is not a condition precedent to the right to sue in respect of a claim arising under a contract. JAGER *v.* TOLME & RUNGE AND THE LONDON PRODUCE CLEARING HOUSE, LD. - **C. A. 939**

SALE OF INTOXICATING LIQUOR—at place not authorized by licence—Agreement to sell - - - - - - - **732**
See LICENSING ACTS. 2.

"SALE OR RETURN" — Goods consigned abroad - - - - - - - **479**
See INSURANCE (JEWELLERY).

SEAMAN—Compensation—Member of crew of fishing vessel—Bonus on value of catch **166**
See WORKMEN'S COMPENSATION. 9.

SECONDARY EVIDENCE — Notice — Proof—Public health—New building — Temporary building—Contravention of by-laws—Right of authority to seize and destroy - - - - - - **863**
See LOCAL GOVERNMENT. 2.

SERVICE— Workmen's compensation — Infant —Service irregular—Waiver by appearance - - - - - - - - **85**
See WORKMEN'S COMPENSATION. 7.

SHEEP—Nuisance — Highway—Sheep straying on highway—Damage to vehicle using highway. *See* NUISANCE. 2. **206**

SHIPPING — *Bill of Lading — Contract of Liability for Unseaworthiness — Unseaworthy Ship—Limitation of Time for Claims—Applicability of Limitation in Case of Unseaworthiness —Transhipment of Goods.*

In an action by indorsees of bills of lading against shipowners for breach of contract and for damages for injury to the goods carried it appeared that the goods were shipped at Wellington, New Zealand, upon the *Clan Maclaren*. At Port Pirie it was discovered that a portion of the goods (wool) was damaged by sea water, and the damaged portion was there transhipped into the *Geelong*. The *Clan Maclaren* arrived in London on April 13 and the *Geelong* on April 23, and on arrival the wool in both ships was found to be damaged by sea water owing to the unseaworthiness of the *Clan Maclaren*. Clause 3 of the bill of lading made provision for transhipment of the goods. Clause 12 provided that "No claim that may arise in respect of goods shipped by this steamer will be recoverable, unless made at the port of delivery within seven days from the date of steamer's arrival there." Clause 14 provided that "The shipowners shall be responsible for loss or damage arising from any unseaworthiness of the vessel when she sails on the voyage." No claim was made by the plaintiffs upon the defendants till June 10, more than seven days after the arrival of either vessel. Bailhache J. held that, as the *Clan Maclaren* was unseaworthy, the provisions of clause 12, which limited the time for making claims, did not apply:—

Held, that, in view of the fact that the bill of lading was subject to an express condition making the shipowners liable for damage resulting from unseaworthiness, the provisions of clause 12 applied.

Held, further, by Pickford and Bankes L.JJ. (Buckley L.J. doubting), that the clause, not being clear and unambiguous, afforded no protection to the shipowners in respect of the goods transhipped to the *Geelong*. BANK OF AUSTRALASIA *v.* CLAN LINE STEAMERS, LD. - **C. A. 39**

2. —— *Bill of Lading—Exception of King's Enemies — Deviation — Ship sunk by German Submarine—Loss of Cargo—Liability of Shipowner.*

When the route and ports of call of a line of steamships have become fixed, mere general words in a bill of lading giving liberty to call at intermediate ports will not justify calling at some entirely fresh intermediate port.

When a ship deviates and loss or damage to cargo carried by her occurs by act of the King's enemies, it is not open to her owners to set up the exception, whether it is contractual or implied by law. The exception applies only to a carrier who is performing his contract, not to one who is breaking it, unless he can show that the loss or damage must have occurred in any event.

Davis v. *Garrett* (1830) 6 Bing. 716 and *Lilley* v. *Doubleday* (1881) 7 Q. B. D. 510 followed.

SHIPPING—*continued.*

The plaintiffs were indorsees and holders of two bills of lading under which wool was shipped at New Zealand in the defendants' steamship for carriage to London. Each bill of lading was upon the defendants' own form and bore upon its face the words "Direct service between New Zealand and London." Clause 1, which was in larger type than the exceptions and conditions, stated that the steamship was "now lying in the port of Napier, N.Z., and bound for London," and, after giving the fullest liberty to proceed to and stay at any ports or places in New Zealand for any purpose and to call at Monte Video or La Plata for certain specified purposes, continued: "with liberty on the way to London to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal, or other supplies." The clause further provided that the goods were "to be delivered subject to all the above liberties to deviate and to the exceptions and conditions at foot hereof." The bill of lading contained seventeen clauses in smaller type, amongst them being an exception clause, which included the acts of the King's enemies, and by clause 3 the defendants were at liberty to carry the goods by other steamers (either belonging to themselves or to other persons) proceeding by any route, and whether directly or indirectly to London, and to tranship them.

The steamer followed the usual track from New Zealand to Ushant, but then proceeded towards Havre to land some goods not belonging to the plaintiffs, and was making for that port when she was torpedoed and sunk with her cargo by a German submarine. The usual ports of call of the defendants' line of steamships (of which Havre was not one) were well known, and the plaintiffs' bills of lading did not give liberty to call at Havre. A letter written by the defendants to their agent in New Zealand contained the passage "there is a distinct risk in deviating from our ordinary route without specific provision being made for it in the bill of lading." There was no greater probability of danger in going to Havre than to London:—

In an action by the plaintiffs to recover the value of their goods from the defendants:—

Held, (1.) that clauses 1 and 3 must be read together and meant that if the goods were transhipped or carried in a steamer not belonging to the defendants, they must have the liberties reserved by clause 3; (2.) that if clauses 1 and 3 must be read separately, the bill of lading became ambiguous and the defendants could not rely upon it as giving the ship liberty to deviate; (3.) upon the assumption that Havre was an intermediate port within the meaning of clause 1, that clause did not give liberty to call there, as it was not one of the defendants' usual ports of call; (4.) that as there had been a wrongful deviation, the defendants could not rely upon the exception of the King's enemies contained in the bills of lading or implied by common law; (5.) that as the proximate cause of the loss was brought into operation by the default of the defendants, who were claiming the benefit of an exception, they were liable for the value of the goods, although

SHIPPING—*continued.*

the plaintiffs had not shown that the natural and probable result of the deviation was that the vessel would be torpedoed. MORRISON & Co. *v.* SHAW, SAVILL AND ALBION CO.
Bailhache J. 747

3. —— *Charterparty*—"*Commandeer.*"

A ship or other thing is said to be "commandeered," when the Government of the owner's country require it to be placed at their disposal so that they may use it for military purposes, if they should want it, whether they in the result ever so use it or not.

The owner of a Greek ship chartered her to the plaintiffs under a charterparty which provided that if she should be "commandeered" by the Greek Government the charterparty should be cancelled. While the ship was lying at Marseilles, the Greek Government sent an order to the captain requiring him to proceed at once to Piræus for the purpose of placing the ship at their disposal, if they should require to use it. Before the ship had left Marseilles, the Greek Government withdrew their order and released the ship:—

Held, that the ship had been commandeered and that the charterparty was cancelled. CAPEL *v.* SOULIDI - - - - **Atkin J. 439**

4. —— *Charterparty—Employment of Ship between "safe ports"—What is a "safe port."*

Where a charterparty provides for the employment of a vessel between "safe ports," the word "safe" implies that the ports must be both physically and politically safe. Dangers likely to be incurred on the voyage to a particular port may be taken into account in considering whether such port is safe to go to or not. In each case it is a question of fact and a question of degree. PALACE SHIPPING CO. *v.* GANS STEAMSHIP LINE - - **Sankey J. 138**

5. —— *Charterparty — Hire—Restraint of Princes—Frustration of Adventure—Right to cancel when Ship not free of Cargo—Form of Cancellation Notice.*

By a charterparty, headed "Time Charter," the plaintiffs let their steamship *Dunolly* to the defendants for one Baltic round at a certain rate of hire per month. In the event of Great Britain or other European Power being involved in war affecting the working of the steamer at the commencement or during the currency of the charterparty the defendants had the option of cancelling. The act of enemies and restraints of princes were mutually excepted. The *Dunolly* came on hire on July 4, 1914, and the first month's hire was paid; she was sub-let by the defendants, and she sailed to the Baltic and was loading a cargo for the sub-charterers at a port in Finland when war broke out between Russia and Germany on August 1 and between Great Britain and Germany on August 4. On August 5, by which date the *Dunolly* was partly loaded and the master had given bills of lading which were held by the sub-charterers, the defendants purported to cancel by a telegram in the following terms: "We hereby notify you that owing to Great Britain being at war affecting the working of *Dunolly*, we exercise our option and now cancel this steamer's charter with the proviso that we

SHIPPING—*continued.*

reserve our claim to proportion of freight to cover hire and charges already paid, and also reserving our right to claim any other losses or damages."

After August 1, in consequence of orders of the Russian authorities, it was impossible for the *Dunolly* to leave the Baltic, and she was still there on November 4, 1914. In an action for the chartered hire to November 4, 1914 :—

Held, that the defendants were liable, inasmuch as (1.) the doctrine of frustration of the adventure set up by them had no application, as that doctrine applies only where the object which both parties had in view is frustrated, and in this case the plaintiffs' object, which was to receive the chartered hire, had not been frustrated by the restraint of princes ; and (2.) they were not entitled to rely on their notice of cancellation, because neither on the date when it was given nor within a reasonable time thereafter were they in a position to hand over the vessel free of cargo and free of commitments.

Semble that the cancellation notice was invalid in view of the reservations contained therein. SCOTTISH NAVIGATION CO. *v.* W. A. SOUTER & CO. - - - **Sankey J. 675**

6. —— *Charterparty—Provision for Cessation of Hire—Mutual Exception Clause—Commercial Frustration of Adventure.*

Where a charterparty specifies the causes which are to excuse payment of hire of the vessel, no other cause can, in the absence of conduct amounting to withdrawal of the vessel or of her actual loss and apart from any question of commercial frustration, be relied upon by the charterers as a reason for cessation of the hire.

The commercial frustration of an adventure by delay means the happening of some unforeseen delay without the fault of either party to a contract, of such a character that by the delay the fulfilment of the contract in the only way in which it is contemplated and practicable is so inordinately postponed that, when the delay is over, fulfilment will not accomplish the only object or objects which both parties must have known that each of them had in view at the time they made the contract, and for the accomplishment of which it was made.

Quaere whether delay due to a cause contemplated and provided for by a charterparty, even though the delay itself is protracted beyond what might have been expected, ever amounts to commercial frustration of the adventure.

By a time charterparty a British ship was chartered to a firm carrying on business at Newcastle-on-Tyne to be employed in such lawful trades between such safe ports of the United Kingdom and the Continent of Europe and/or Baltic as the charterers or their agents should direct. The hire was payable half-monthly in advance in Glasgow. The charterparty provided that on the happening of certain events (which did not include restraints of princes) the hire was to cease. It contained a mutual exception clause which included "restraints of princes." It also contained a provision that in the event of Great Britain or other European Power being involved in war affecting the working of the

SHIPPING—*continued.*

steamer at the commencement or during the currency of the charter the charterers were to have the option of cancelling the charter. The vessel proceeded under the charterparty to the Baltic, where she was detained by the Russian naval authorities, and shortly afterwards—war having broken out between Great Britain and Germany—it became impossible for her to continue her voyage, the cause of her detention being treated by the Court as due to "restraint of princes." The charterers had, before the war broke out, sub-chartered the vessel :—

Held, that the charterers continued to be liable for hire, as none of the enumerated reasons for cessation of hire had happened, and the adventure had not been commercially frustrated, inasmuch as under the charterparty the charterers could, if they pleased, have laid up the vessel or have sent her to continental ports instead of to the Baltic.

Held, further, that as the charterparty expressly provided that in the event of war affecting the working of the steamer the charterers had the option of cancelling the charterparty, cancellation was their only remedy, although it might be that in this case the charterers had put it out of their power to exercise that remedy, as to which the Court expressed no opinion.

Quaere whether the doctrine of commercial frustration has any application to a time charterparty, or to the happening of a contingency for which a charterparty makes provision. ADMIRAL SHIPPING CO. *v.* WEIDNER, HOPKINS & CO. - - - - - **Bailhache J. 429**

7. —— *Charterparty—Sub-charter—Breach of by Sub-charterer—Measure of Damages—Duty of Plaintiffs to minimize Loss—Right to take into Consideration the Fact that Plaintiffs entitled to cancel their own Charterparty.*

The owners of a ship chartered her to the plaintiffs for a particular voyage under a charterparty which stipulated for freight at the rate of 21*s.* per ton, and provided that in a certain event (which happened) the plaintiffs should be at liberty to cancel the charterparty. The plaintiffs sub-chartered the ship to the defendants for the same voyage at a freight of 28*s.* 6*d.* per ton. The defendants, in breach of their contract, refused to load. The rate of freight obtainable in the market for a similar ship at the date of the breach had fallen to 17*s.* per ton :—

Held, that as the contract related to the hire of a specific ship which the plaintiffs were entitled to get rid of at a saving to themselves of 21*s.* per ton, the measure of damages was the difference between 28*s.* 6*d.* and 21*s.*, and not the difference between 28*s.* 6*d.* and 17*s.*, the market rate. ANDREW WEIR & CO. *v.* DOBELL & CO. **Rowlatt J. 722**

8. —— *Charterparty — Tank Steamship — Time Charterparty—Employment for Carriage of Oil as Charterers should direct—Liberty to sub-let on Admiralty or other Service—Requisition of Steamship by Admiralty—Employment for Transport of Troops—Effect of Requisition—Restraint of Princes—Frustration of Adventure*

SHIPPING—*continued.*

—*Whether Charterparty put an end to or suspended.*

By a time charterparty a tank steamship was chartered to be employed in such lawful trades for voyages between any safe ports within certain limits for the carriage of oil as the charterers or their agents should direct. The charterers were to pay for the use and hire of the vessel a fixed sum per month. The charterparty contained an exception (inter alia) of "arrests and restraints of princes" and the charterers had the liberty of sub-letting the steamer on Admiralty or other service. During the currency of the charterparty the steamer was requisitioned by the Admiralty and after necessary alterations was employed by them in the transport of troops. The charterers had paid and were willing to continue to pay the agreed freight, and contended that the contract was still subsisting :—

Held, that there was no implied condition in the charterparty that the steamer should remain fit for the carriage of oil ; that the commercial adventure had not been frustrated, inasmuch as each party was deriving in substance, though not in form, a substantial part of the benefit they respectively contemplated obtaining from the enterprise, and there was nothing to prevent the charterers resuming the control of the vessel and completing the charter, if and when the Government restored the vessel to them ; and that consequently the requisition by the Admiralty of the steamer did not put an end to or suspend the charterparty.

Jackson v. *Union Marine Insurance Co.* (1874) L. R. 10 C. P. 125, distinguished.

Decision of Atkin J. [1915] 3 K. B. 668 affirmed. F. A. TAMPLIN STEAMSHIP CO. *v.* ANGLO-MEXICAN PETROLEUM PRODUCTS CO. - - - - - - - - **C. A. 485**

9. —— *Charterparty — Time Charter — Restraint of Princes—Requisition by Admiralty —Claim for Hire.*

A time charter provided that the owners should let and the charterers should hire a steamship for twelve months at a certain sum payable monthly for hire. The charter contained certain restrictions on the user of the ship and certain exceptions, by one of which restraint of princes was mutually excepted. The charterers were to have the option of subletting the ship. After the ship had been placed at the charterers' disposal, the Admiralty by notices addressed first to the owners and then to the charterers requisitioned the ship for the service of the Government, and sent the owners a form of charterparty free from the restrictions of the time charter and specifying a monthly sum for hire less than that named in the time charter. The ship was then placed at the disposal of the Admiralty and was restored to the owners during the currency of the time charter :—

Held, that the owners were entitled to hire under the time charter, notwithstanding the requisition of the ship by the Admiralty ; and that the interest which was affected by the requisition was that of the charterers and not

SHIPPING—*continued.*

that of the owners. MODERN TRANSPORT CO. *v.* DUNERIC STEAMSHIP CO. - **Sankey J. 726**

—— Insurance (Marine).
See INSURANCE (MARINE).

—— Workmen's compensation.
See WORKMEN'S COMPENSATION.

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—— Repeal by implication.
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—— Repeal—By-law - - - - **688**
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1677.

29 Car. 2, c. 7 (Sunday Observance), s. 1 : FAIRBURN *v.* EVANS - - **Div. Ct. [1916] 1 K. B. 218**

1700.

12 & 13 Will. 3, c. 2 (Settlement of the Crown), s. 3 : REX *v.* SPEYER. REX *v.* CASSEL **Div. Ct. [1916] 1 K. B. 595**

1786.

26 Geo. 3, c. 71 (Knackers), s. 1 : REX *v.* ESSEX JJ. *Ex parte* BARKING TOWN U. D. C. - **Div. Ct. [1916] 1 K. B. 665**

1812.

52 Geo. 3, c. 150 (Medicines Stamp), Schedule : KNOLL *v.* RENSHAW - - **Div. Ct. [1916] 1 K. B. 700**

1831.

1 & 2 Will. 4, c. 41 (Special Constables), ss. 4, 9, 10 : METROPOLITAN POLICE COMMR. *v.* HANCOCK **Div. Ct. [1916] 1 K. B. 190**

1839.

2 & 3 Vict. c. 93 (Police), s. 6 : METROPOLITAN POLICE COMMR. *v.* HANCOCK **Div. Ct. [1916] 1 K. B. 190**

1842.

5 & 6 Vict. c. 35 (Income Tax), ss. 102, 103 : BLOUNT *v.* BLOUNT [1916] **1 K. B. 230**

STATUTES—*continued.*

1847.

10 & 11 Vict. c. 17 (Waterworks Clauses), s. 68: WOKING WATER AND GAS CO. *v.* PARKER - - - **Div. Ct.** [1916] 1 K. B. 473

10 & 11 Vict. c. 34 (Towns Improvement Clauses), ss. 125, 131: REX *v.* ESSEX JJ. *Ex parte* BARKING TOWN U. D. C. **Div. Ct.** [1916] 1 K. B. 665

1848.

11 & 12 Vict. c. 43 (Summary Jurisdiction), s. 5: FAIRBURN *v.* EVANS - **Div. Ct.** [1916] 1 K. B. 218

1853.

16 & 17 Vict. c. 34 (Income Tax), s. 40: BLOUNT *v.* BLOUNT [1916] 1 K. B. 230

16 & 17 Vict. c. 119 (Betting), s. 1: PEERS *v.* CALDWELL - - [1916] 1 K. B. 371

1855.

18 & 19 Vict. c. 120 (Metropolis Management), s. 105: PAPWORTH *v.* BATTERSEA CORPORATION (No. 2) - - **C. A.** [1916] 1 K. B. 583

1869.

32 & 33 Vict. c. 14 (Revenue), ss. 18, 22, 27: SLY *v.* RANDALL - - **Div. Ct.** [1916] 1 K. B. 710

32 & 33 Vict. c. 68 (Evidence Amendment), s. 2: QUIRK *v.* THOMAS (EXECUTOR OF) **C. A.** [1916] 1 K. B. 516

1870.

33 & 34 Vict. c. 14 (Naturalization), s. 7: REX *v.* SPEYER **Div. Ct.** [1916] 1 K. B. 595

1875.

38 & 39 Vict. c. 55 (Public Health), s. 116: WILLIAMS *v.* ALLEN **Div. Ct.** [1916] 1 K. B. 425

—— —— s. 157: ANDREWS *v.* WIRRAL R. D. C. - **C. A.** [1916] 1 K. B. 863

—— —— s. 169: REX *v.* ESSEX JJ. *Ex parte* BARKING TOWN U. D. C. **Div. Ct.** [1916] 1 K. B. 665

—— —— s. 211, sub-s. 1 (*b*): MERSEY DOCKS AND HARBOUR BOARD *v.* BIRKENHEAD CORPORATION **C. A.** [1916] 1 K. B. 695

—— —— ss. 211, 256: WHENMAN *v.* CLARK **C. A.** [1916] 1 K. B. 94

38 & 39 Vict. c. 63 (Sale of Food and Drugs), ss. 3, 5: HAIGH *v.* AERATED BREAD CO. - **Div. Ct.** [1916] 1 K. B. 878

1879.

42 & 43 Vict. c. cxxv. (Norwich Improvement), s. 45; WATSON *v.* WINCH **Div. Ct.** [1916] 1 K. B. 688

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1881.

44 & 45 Vict. cxvi. (Woking Water and Gas), ss. 2, 49: WOKING WATER AND GAS CO. *v.* PARKER **Div. Ct.** [1916] 1 K. B. 473

1882.

45 & 46 Vict. c. 75 (Married Women's Property): WEBSTER *v.* WEBSTER [1916] 1 K. B. 714

1886.

49 & 50 Vict. c. 38 (Riot (Damages)), ss. 2, 3, 4: KAUFMANN BROTHERS *v.* LIVERPOOL CORPORATION **Div. Ct.** [1916] 1 K. B. 860

1888.

51 & 52 Vict. c. 41 (Local Government), s. 85: WATSON *v.* WINCH **Div. Ct.** [1916] 1 K. B. 688

51 & 52 Vict. c. 43 (County Courts), s. 74: CAIN *v.* BUTLER **Div. Ct.** [1916] 1 K. B. 759

1889.

52 & 53 Vict. c. 21 (Weights and Measures), s. 27: SWALLOW *v.* LONDON C. C. **Div. Ct.** [1916] 1 K. B. 224

1890.

53 & 54 Vict. c. 39 (Partnership), ss. 34, 37, 38, 39, 40: HUGH STEVENSON & SONS, LD. *v.* AKTIENGESELLSCHAFT FÜR CARTONNAGEN-INDUSTRIE - [1916] 1 K. B. 763

53 & 54 Vict. c. 59 (Public Health), ss. 7, 29: REX *v.* ESSEX JJ. *Ex parte* BARKING TOWN U. D. C. - - - **Div. Ct.** [1916] 1 K. B. 665

53 & 54 Vict. c. 70 (Housing of the Working Classes), ss. 7, 20, 21; Sched. II.: LONDON C. C. *v.* WILSON'S EXECUTORS [1916] 1 K. B. 837

1891.

54 & 55 Vict. c. 39 (Stamps), Sched. I.: UNDERGROUND ELECTRIC RYS. CO. OF LONDON AND OTHERS *v.* INLAND REV. COMMRS. - **C. A.** [1916] 1 K. B. 306

1892.

55 & 56 Vict. c. xlviii. (Lancashire and Yorkshire Railway, &c., Order Confirmation), Schedule, s. 5, sub-s. 4: LANCASHIRE AND YORKSHIRE RY. CO. *v.* SWANN **Div. Ct.** [1916] 1 K. B. 263

1893.

56 & 57 Vict. c. 61 (Public Authorities Protection), s. 1: KAUFMANN BROTHERS *v.* LIVERPOOL CORPORATION **Div. Ct.** [1916] 1 K. B. 860

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1894.

56 & 57 Vict. c. 73 (Local Government), s. 27: REX *v.* ESSEX JJ. *Ex parte* BARKING TOWN U. D. C. - - - **Div. Ct.** [1916] 1 K. B. 665

57 & 58 Vict. c. clxxxvii. (Thames Conservancy), s. 289: WHENMAN *v.* CLARK - **C. A.** [1916] 1 K. B. 94

1896.

59 & 60 Vict. c. 25 (Friendly Societies), ss. 46, 84, 89: LOUGHER *v.* MOLYNEUX [1916] 1 K. B. 718

1901.

1 Edw. 7, c. 22 (Factory and Workshop), s. 146, sub-s. 1: BOYDEL *v.* LEVANT MINE ADVENTURERS - **Div. Ct.** [1916] 1 K. B. 692

1906.

6 Edw. 7, c. 58 (Workmen's Compensation): WARBURTON *v.* CO-OPERATIVE WHOLESALE SOCIETY - [1916] 1 K. B. 906

—— —— s. 1: JOY *v.* PHILLIPS, MILLS & CO. **C. A.** [1916] 1 K. B. 849

—— —— s. 1, sub-s. 1: READ *v.* BAKER **C. A.** [1916] 1 K. B. 927

—— —— s. 1, sub-s. 1; Sched. I., pars. 1 (*b*), 16: HART *v.* CORY BROTHERS, LD. **C. A.** [1916] 1 K. B. 172

—— —— ss. 1, 2: BURVILL *v.* VICKERS, LD. **C. A.** [1916] 1 K. B. 180

—— —— s. 7, sub-s. 2: NEWSTEAD *v.* LABRADOR (OWNERS) - - **C. A.** [1916] 1 K. B. 166

—— —— s. 8, sub-s. 1 (*f*): BEDFORD *v.* COWTAN & SONS, LD. - - **C. A.** [1916] 1 K. B. 980

—— —— s. 13; Sched. I., par. 1 (*a*): MONTGOMERY *v.* BLOWS - - - **C. A.** [1916] 1 K. B. 899

—— —— Sched. I., par. 1 (*a*) (i.): ROBINSON *v.* CONSETT IRON CO. - - **C. A.** [1916] 1 K. B. 856

—— —— Sched. I., par. 16: LEVERINGTON *v.* A. DODMAN & CO. - - - **C. A.** [1916] 1 K. B. 964

—— —— Sched. I., pars. 16, 17: MORELAND & SONS *v.* ELEY - - - - **C. A.** [1916] 1 K. B. 85

—— —— Sched. II., par. 7: HIGGINS *v.* L. HIGGINS & CO. - - - - **C. A.** [1916] 1 K. B. 640

—— —— Sched. II., par. 9: MADDEN *v.* GUEST'S EXECUTORS - - **C. A.** [1916] 1 K. B. 76

1907.

7 Edw. 7, c. 23 (Criminal Appeal), s. 3 (*a*), (*b*): REX *v.* TONKS - - **C. C. A.** [1916] 1 K. B. 443

STATUTES—*continued.*

7 Edw. 7, c. 53 (Public Health Acts Amendment), s. 23: REX *v.* FOOT'S CRAY U. D. C. - **C. A.** [1916] 1 K. B. 246

—— —— s. 27, sub-s. 4: ANDREWS *v.* WIRRAL R. D. C. - - **C. A.** [1916] 1 K. B. 863

1908.

8 Edw. 7, c. 28 (Agricultural Holdings), s. 13; Sched. II., r. 13: LORD ASHBURTON *v.* GRAY - **Div. Ct.** [1916] 1 K. B. 452

8 Edw. 7, c. 67 (Children), s. 12, sub-ss. 1 (*b*), 3, 4: REX *v.* TONKS **C. C. A.** [1916] 1 K. B. 443

1910.

10 Edw. 7, c. 8 (Finance (1909-10)), ss. 1, 22: INLAND REV. COMMRS. *v.* SHEFFIELD AND SOUTH YORKSHIRE NAVIGATION CO. - **C. A.** [1916] 1 K. B. 882

10 Edw. 7 & 1 Geo. 5, c. 24 (Licensing), s. 20: REX *v.* SHEFFIELD JJ. *Ex parte* MORRISON - **Div. Ct.** [1916] 1 K. B. 682

—— —— s. 65, sub-ss. 1, 2; s. 85: TITMUS *v.* LITTLEWOOD **Div. Ct.** [1916] 1 K. B. 732

1911.

1 & 2 Geo. 5, c. 50 (Coal Mines), s. 31, sub-s. 3; s. 101, sub-s. 2; s. 102, sub-s. 1 (*a*): ATKINSON *v.* LEWIS MERTHYR CONSOLIDATED COLLIERIES, LD. [1916] 1 K. B. 363

1 & 2 Geo. 5, c. 55 (National Insurance), ss. 8, 15, 65: O'NEILL *v.* MIDDLESEX INSURANCE COMMITTEE [1916] 1 K. B. 331

—— —— s. 11, sub-s. 2: SKELTON *v.* BAXTER **C. A.** [1916] 1 K. B. 321

—— —— ss. 66, 69; Sched. I., Part I. (*c*), Part II. (*g*): REX *v.* WILBERFORCE **Div. Ct.** [1916] 1 K. B. 239

1914.

4 & 5 Geo. 5, c. 17 (British Nationality and Status of Aliens), s. 3; REX *v.* SPEYER. REX *v.* CASSEL **Div. Ct.** [1916] 1 K. B. 595

4 & 5 Geo. 5, c. 47 (Deeds of Arrangement), ss. 1, 3, 5, 23: *In re* WILSON **C. A.** [1916] 1 K. B. 382

4 & 5 Geo. 5, c. 61 (Special Constables), s. 1, sub-s. 1: METROPOLITAN POLICE COMMR. *v.* HANCOCK **Div. Ct.** [1916] 1 K. B. 190

4 & 5 Geo. 5, c. 78 (Courts (Emergency Powers)), s. 1, sub-s. 1 (*b*): BARNARD *v.* FOSTER **C. A.** [1916] 1 K. B. 632

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4 & 5 Geo. 5, c. 87 (Trading with the Enemy), s. 2, sub-s. 1: HUGH STEVENSON & SONS, LD. *v.* AKTIENGESELLSCHAFT FÜR CARTONNAGEN-INDUSTRIE [1916] 1 K. B. 763

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5 Geo. 5, c. 8 (Defence of the Realm (Consolidation)): REX *v.* HALLIDAY
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5 Geo. 5, c. 12 (Trading with the Enemy), s. 2, sub-ss. 1, 5; s. 3, sub-s. 2: HUGH STEVENSON & SONS, LD. *v.* AKTIENGESELLSCHAFT FÜR CARTONNAGEN-INDUSTRIE - [1916] 1 K. B. 763

1915.

5 Geo. 5, c. 36 (Legal Proceedings against Enemies): HUGH STEVENSON & SONS, LD. *v.* AKTIENGESELLSCHAFT FÜR CARTONNAGEN-INDUSTRIE
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SUBSIDENCE — Mining lease — Subsidence of surface—Liability of mining lessees and lessor to building lessee - - 123
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SUGAR — Sale of — London Produce Clearing House Regulations 19, 20—Rules of Sugar Association of London, rule 491B
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SUNDAY OBSERVANCE—*Purchase from Refreshment House Keeper on Sunday—Knowledge that Refreshment House Keeper had committed Offence of exercising his Ordinary Calling on Sunday—Aiding and abetting Commission of Offence — Sunday Observance Act*, 1677 (29 *Car.* 2, *c.* 7), *s.* 1—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 5.

The appellant purchased sweets from a refreshment house keeper on a Sunday and took them from the premises for consumption. At the time of his purchase the appellant knew that the refreshment house keeper was exercising his ordinary calling on the Sunday and that he had constantly been convicted of having done so on previous occasions under the Sunday Observance Act, 1677:—

Held, that the appellant could be convicted of aiding and abetting the refreshment house keeper in the exercise of his ordinary calling in contravention of the Act of 1677. FAIRBURN *v.* EVANS - - - - - - Div. Ct. 218

SUPPLY OF INTOXICATING LIQUOR—Gratuitous supply to friend of licensee — Offence—Defence of the Realm (Liquor Control) Regulations, 1915 — Central Control Board (Liquor Traffic) Order, July 30, 1915 - - - - 917
See LICENSING ACTS. 3.

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TAXATION OF COSTS.
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WAIVER—Employer and workman—Compensation—Review of weekly payments—Redemption—Infant—Service irregular—Waiver by appearance—Indefeasible right to redemption - - - **85**
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WAR—Alien enemy.
See ALIEN ENEMY.

WATER COMPANY—*Supply of Water—Water Rate — Net Annual Value — Gross estimated Annual Rental—General Act "expressly varied" by Special Act—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 68—*Woking Water and Gas Act*, 1881 (44 & 45 *Vict. c. cxvi.*), *ss.* 2, 49.

The special Act of a water company incorporated the Waterworks Clauses Act, 1847, "except where expressly varied by" the special Act. Sect. 68 of the Waterworks Clauses Act, 1847, provides that the water rates, except as thereinafter and in the special Act mentioned, shall be payable according to the annual value—which has been held to mean the net annual value—of the tenement supplied with water. A section (s. 49) of the special Act provided that the company should furnish water at rates not exceeding the yearly rates thereinafter specified, namely, where the gross estimated annual rental of the premises supplied should not exceed a certain amount, at a rate per cent. per annum not exceeding an amount specified :—

Held, that by this section the rate per cent. per annum was to be calculated upon the gross estimated annual rental and that s. 68 of the Waterworks Clauses Act, 1847, was expressly varied thereby. WOKING WATER AND GAS CO. *v.* PARKER - - - - **Div. Ct. 473**

WEEKLY PAYMENTS—Compensation—Review of weekly payments - - - **85**
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WEIGHTS AND MEASURES — *Coal — Refusal by Carman to assist in weighing Coal—"Obstructing of the Weighing"—Weights and Measures Act*, 1889 (52 & 53 *Vict. c.* 21), *s.* 27.

Under s. 27 of the Weights and Measures Act, 1889, the person in charge of a vehicle in which coal is carried is under no obligation to weigh or assist in weighing the coal carried in the vehicle. The mere refusal, therefore, by him to assist in weighing the coal, although required to do so by an officer of the local authority, does not constitute an obstruction of the weighing within sub-s. 2 of s. 27. SWALLOW *v.* LONDON C. C. - - - - - - **Div. Ct. 224**

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—— "Commandeer": CAPEL *v.* SOULIDI [1916] **1 K. B. 439**

—— "Deposited in any place": WILLIAMS *v.* ALLEN - - [1916] **1 K. B. 425**

—— "Entire" drug: KNOLL *v.* RENSHAW **Div. Ct.** [1916] **1 K. B. 700**

—— "Exercise any right of re-entry": NESS *v.* O'NEIL - **C. A.** [1916] **1 K. B. 706**

WORDS—*continued.*

—— "Free of income tax": BLOUNT *v.* BLOUNT [1916] **1 K. B. 230**

—— "Held out or recommended to the public": KNOLL *v.* RENSHAW - - **Div. Ct.** [1916] **1 K. B. 700**

—— "Land covered with water": MERSEY DOCKS AND HARBOUR BOARD *v.* BIRKENHEAD CORPORATION - **C. A.** [1916] **1 K. B. 695**

—— "New building": REX *v.* FOOT'S CRAY U. D. C. - - [1916] **1 K. B. 246**

—— "Obstructing of the weighing": SWALLOW *v.* LONDON C. C. - [1916] **1 K. B. 224**

—— "Parochial rates": WHENMAN *v.* CLARK [1916] **1 K. B. 94**

—— "Person aggrieved" : *Ex parte* STOTT **Div. Ct.** [1916] **1 K. B. 7**

—— "Safe ports": PALACE SHIPPING CO. *v.* GANS STEAMSHIP LINE [1916] **1 K. B. 138**

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WORKMAN—Employer and.
See WORKMEN'S COMPENSATION.

WORKMEN'S COMPENSATION — *Accident (Fatal)—Risk not incidental—Solicitor's Clerk—Cycling from Court to Office—Arising "out of" his Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

The deceased, a solicitor's clerk, used to attend on his employer's business at a Court held once a week by local justices to whom the employer was clerk. The Court was ten miles from the solicitor's office, and sometimes the deceased travelled to and fro by train, his fare in that case being paid by his employer, and at other times, to the knowledge and without the disapproval of his employer, he rode there and back on his bicycle. On the day of his death he was returning from the Court to the office on his bicycle when a motor lorry collided with it and he was killed :—

Held, that in the circumstances the use of the bicycle was not attended by any special risk, and that the accident to the deceased did not arise "out of the employment." READ *v.* BAKER **C. A. 927**

2. —— *Accident—Evidence—Death caused by Accident—Kick from quiet Horse—Evidence as to Habit of Deceased Workman of hitting and teasing Horses—Admissibility—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

The deceased workman, who was employed as a stable boy by the respondents, was found in their stable in a dying condition, suffering from a kick behind the ear from one of their horses. There was no direct evidence as to how the accident happened. There was evidence that when the boy was found, he was clutching in his hand a halter ; that at the time when the

accident happened, the boy had nothing to do with the halter and had nothing to do in the stable; and that the horse was a quiet horse. There was also evidence that the foreman of the respondents' yard had some time previously had occasion to speak to the boy about hitting the horses with a halter and teasing them. The county court judge held that the boy must have done something to the horse, which was a quiet one, to make it kick out, and that at the time of the accident the boy's duties in the stable were over, and accordingly that the accident did not arise out of his employment :—

Held, that there was sufficient evidence upon which the county court judge might come to the conclusions he did.

Held, also, that evidence as to the previous habits of the boy with regard to hitting and teasing the horses was admissible.

Per Phillimore L.J.: Wherever an inquiry has to be made into the cause of death of a person, and, there being no direct evidence, recourse must he had to circumstantial evidence, any evidence as to the habits and ordinary doings of the deceased which may contribute to the circumstances by throwing light upon the probable cause of death is admissible, even in the case of a prosecution for murder. JOY *v.* PHILLIPS, MILLS & CO. - - - C. A. 849

3. —— *Accident—Notice—Default in giving Notice—Employer prejudiced in his Defence—Evidence—Burden of Proof—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 1, 2.

A workman who was employed in a shell factory contracted blood poisoning from an abrasion on his finger, from which he died. There was no evidence as to the exact date on which he received the injury, and no notice of any accident was served upon the employers until after his death. He returned from his work on March 6, 1915, and according to his wife's evidence seemed very ill and went to bed. A doctor saw him the next day and found a poisoned wound on his finger, from the effects of which he died on March 14. His widow applied for compensation under the Workmen's Compensation Act, 1906, and stated the nature of the injury to be blood poisoning resulting from an accident to the deceased's hand on March 6. On the hearing of the arbitration it was contended that there was no evidence of the exact date of the accident, and that no notice of the accident had been given as required by s. 2 of the Act. There was no evidence that the employers were prejudiced in their defence by the want of notice. The county court judge, in giving his award, treated the points taken by the employers as purely technical, and held that death had resulted from an accident arising out of and in the course of the employment, and that the employers had not been prejudiced in their defence by the want of notice. He accordingly awarded compensation to the widow. On appeal by the employers :—

Held, that while the question of want of notice could not be treated as unimportant, yet in this case, as in *Hayward* v. *Westleigh Colliery Co.* [1915] A. C. 540, there being no inherent probability from the facts that the employers would be prejudiced by the want of notice, the onus was shifted from the workman to the employers, and the Court would not interfere with the finding of fact by the county court judge that the employers had not been prejudiced. BURVILL *v.* VICKERS, LD. - - C. A. 180

4. —— *Approved Society—Injury by Accident arising out of and in Course of Employment—National Insurance—Right to take Proceedings against Employer in Workman's Name—National Insurance Act*, 1911 (1 & 2 *Geo.* 5, *c.* 55), *s.* 11, *sub-s.* 2.

The intention of s. 11 of the National Insurance Act, 1911, is that an insured person who has been injured by accident in the course of his employment shall look primarily to any compensation which he may be entitled to recover from his employer, and shall rely upon the sickness and disablement benefit under the Insurance Act, only where no compensation is payable, or where it is less in amount than the benefit to which he is entitled under the Insurance Act. Sect. 11, sub-s. 2, which gives an approved society the right of using the workman's name, when he unreasonably refuses or neglects to take proceedings for compensation against his employer, does not deprive the society of any right it may have of assisting an injured workman to recover compensation. The society may properly inform him that he is entitled to compensation and suggest that he should take proceedings, and if the workman wishes to enforce his claim, and the society obtains for its own solicitor the necessary authority to act and agrees to indemnify the applicant against costs, the proceedings may none the less be held to be taken by the applicant, and not by the society in its own interest. SKELTON *v.* BAXTER C. A. 321

5. —— *Compensation—Agreement—Recording—Inference from Evidence—Receipt—Finding of Fact—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. II., par.* 9.

A workman who had received compensation under the Workmen's Compensation Act, 1906, applied to have an agreement with the employers recorded. He alleged that the terms of the agreement were contained in certain receipts, but this was denied by the employers, and the county court judge declined to infer that there had been any such agreement and dismissed the application :—

Held, on appeal, that the refusal to infer an agreement was a finding of fact by the county court judge, and that he was not bound to infer an agreement from the receipts.

Babcock & Wilcox v. *Pearson* (1913) 6 B. W. C. C. 841 distinguished.

Scott v. *Sanquhar and Kirkconnel Collieries* (1915) 8 B. W. C, C. 405 dissented from. MADDEN *v.* EXECUTORS OF RICHARD GUEST C. A. 76

6. —— *Compensation—Assessment—Accident—Death — Dependant — Maximum — Deduction of Weekly Payments already made—"Such sum"*

WORKMEN'S COMPENSATION—*continued.*

—*Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched.* I., *par.* 1 (*a*) (i.).

A workman met with an accident, as a result of which he died, and his widow applied for compensation. His earnings for the three years next preceding the accident amounted to 365*l.* 6*s.*, and before his death he had received weekly payments of compensation amounting to 63*l.* 13*s.* 8*d.* The applicant was wholly dependent on his earnings. She claimed to be entitled under Sched. I., par. 1 (*a*) (i.), of the Act of 1906 to 300*l.* on the ground that the 63*l.* 13*s.* 8*d.* compensation ought to be deducted from the total amount of his wages, 365*l.* 6*s.*, received during the last preceding three years, and not from 300*l.*, the maximum allowed by par. 1 (*a*) (i.), the result being that she would receive 300*l.* instead of 236*l.* 6*s.* 4*d.* as claimed by the employers :—

Held, that the words "such sum" in par. 1 (*a*) (i.) from which the compensation already received was to be deducted meant the maximum sum which was payable by the employers, namely, the 300*l.*, and that the widow was entitled to recover 236*l.* 6*s.* 4*d.* ROBINSON *v.* CONSETT IRON CO. - - - - **C. A. 856**

7. —— *Compensation — Review of Weekly Payments—Redemption—Infant — Service irregular — Waiver by Appearance — Indefeasible Right to Redemption—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., pars.* 16, 17.

The rights given to a workman by Sched. I., par. 16, and to the employer by Sched. I., par. 17, of the Workmen's Compensation Act, 1906, are co-equal rights, and the fact that the employer's application to redeem on the footing of existing facts is prior in date to the application of an infant workman for an increase of compensation does not give the former an absolute indefeasible right to his order.

The claimant, a girl of thirteen, met with an accident in April, 1910, which left her right hand useless. Liability under the Act was admitted, and the employers paid her her full wages, 5*s.* 5*d.* a week, as compensation. In 1911 an agreement was recorded whereby the employers found her light work at 3*s.* a week, and the compensation was reduced to 2*s.* 5*d.* In March, 1912, the employers applied for redemption of their liability. Notice of the application was not properly served on the claimant, but a solicitor appeared under protest for her at the hearing of the application for redemption and took the objection of want of service. The claimant applied for an increase of compensation, and both applications came on for hearing on the same day, that of the employers being first in the list. The county court judge refused, on the ground of want of service, to hear the application for redemption, and on the application of the claimant increased the compensation to 5*s.* 6*d.* a week, with costs of both applications to be paid by the employers :—

Held, that the defect in service had been waived by the appearance of the solicitor for the claimant, but that the employers had no such indefeasible right to have their application for redemption heard first as could prevent the learned judge from exercising his discretion as he had done. MORELAND & SONS *v.* ELEY. ELEY *v.* MORELAND & SONS - - **C. A. 85**

WORKMEN'S COMPENSATION—*continued.*

8. —— *Compensation—Review—Termination — Incapacity arising from Accident — Concurrent Causes—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1 ; *Sched. I., pars.* 1 (*b*), 16.

In a claim for compensation under the Workmen's Compensation Act, 1906, it appeared that the claimant had lost the sight of his left eye by an accident and that afterwards the usefulness of his right eye was diminished by accident or disease :—

Held, that he was not entitled to treat the first accident as a concurrent cause of the incapacity caused by injury or disease to his right eye on the ground that the loss of the sight of the left eye made his incapacity greater than it would have been if he had retained the full use of his left eye. The claim for further compensation on account of the accident to the left eye could only arise if the failure of sight in the right eye had been caused by the accident to the other.

Held, further, that the existence of a suspensory award made no difference.

Hargreave v. *Haughhead Coal Co.* [1912] A. C. 319 applied. HART *v.* CORY BROTHERS, LD. - - - - - - - **C. A. 172**

9. —— *Compensation—Seaman—Member of Crew of Fishing Vessel — Bonus on Value of Catch—Remuneration by Shares in Profits or Gross Earnings—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 7, *sub-s.* 2.

A claim for compensation by the widow of a member of the crew of a fishing vessel, which was lost with all hands, was resisted by the owners on the ground that the deceased was remunerated by a share in the profits or gross earnings of the vessel within s. 7, sub-s. 2, of the Workmen's Compensation Act, 1906, and therefore that the Act did not apply to him. He was employed as chief engineer on board a steam trawler at a fixed weekly wage of 2*l.* 5*s.* It was the custom of the owners, when the gross earnings of the boat exceeded 100*l.* for any one trip (each trip being usually of about a week's duration), to allow a sum of 2*l.* by way of bonus, of which 1*l.* went to the captain and 2*s.* 6*d.* to each of the remaining eight members of the crew. If the gross earnings of the boat exceeded 125*l.*, the bonus was proportionately increased and so on, but it was not further increased if the gross earnings realized more than 175*l.* :—

Held, that the bonus was not a share in either the profits or the gross earnings of the vessel, but was an additional sum for wages determined by the amount of the gross earnings. The applicant was therefore entitled to compensation.

Costello v. *Owners of Ship Pigeon* [1913] A. C. 407, *Burman* v. *Zodiac Steam Fishing Co.* [1914] 3 K. B. 1039, and *Stephenson* v. *Rossall Steam Fishing Co.* (1915) 8 B. W. C. C. 209 distinguished. NEWSTEAD *v.* LABRADOR (OWNERS) - - - - - **C. A. 166**

WORKMEN'S COMPENSATION—*continued.*

10. —— *Costs—Discretion—Successful Party ordered to pay Costs.*

A workman having met with an accident in consequence of which he was ruptured, his employers admitted liability under the Workmen's Compensation Act, 1906, and paid him compensation for thirteen weeks, when they discontinued it on the ground that the incapacity had ceased. The workman applied for arbitration, alleging that the question which had arisen was "as to the amount (or duration) of the compensation payable" to him by his employers under the Act of 1906; and he claimed full compensation upon the ground that he was still partially incapacitated and likely to be so for some months. The parties agreed to refer to a medical referee the questions as to his condition and fitness for employment, and whether his incapacity, if any, was due to the accident. The referee reported that the rupture was caused by the accident, but that the applicant was fit for his former work if he wore a belt. The employers thereupon filed answers in which they denied incapacity and their liability to pay further compensation. The applicant insisted that his incapacity still continued. The matter came before the county court judge, who, at the applicant's request and without objection on the part of the employers, granted to the applicant a declaration of liability but nothing more, and ordered the employers to pay his costs:—

Held, that under Sched. II., par. 7, of the Workmen's Compensation Act, 1906, the costs were in the discretion of the arbitrator just in the same way as costs in the High Court were in the discretion of the judge; but that it was settled that to make this discretion effective there must be materials on which the discretion could be exercised. Here there were no such materials and the employers had been successful throughout, so that there had been no judicial exercise of the judge's discretion, and the order on the employers to pay the costs must be discharged. HIGGINS *v.* L. HIGGINS & CO.

C. A. 640

11. —— *Dependants—Death from Accident of Father of Married Woman living with her Husband — Contribution by Father to Household Expenses in Consideration of Board and Lodging —Partial Dependency — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13; *Sched. I., par.* 1 (*a*).

The applicant, a married woman living with her husband and five children, claimed to be partially dependent upon her father, who was killed by an accident arising out of and in the course of his employment by the respondent. For five years before his death the deceased had lodged with the applicant and her husband, paying 13*s.* a week towards the household expenses, rendering certain services, and making occasional presents to his daughter. Her husband earned 2*l.* 9*s.* a week, out of which he allowed her 23*s.* for the housekeeping of the family, she being under the mistaken idea that his wages were only 30*s.* a week. The household expenses amounted to 36*s.* a week. In an arbitration under the Workmen's Compensation Act, 1906, the county court judge estimated that the total profit derived from the excess of the father's payments, services, and gifts was about 3*s.* a week; but he found as a fact that the applicant was not a dependant:—

Held, that his award was right. The husband provided the home and the whole means of living; if there was any profit arising from the deceased's payments, it belonged to the husband, and if there was any dependency, it was that of the husband, who could not claim as a dependant under the Act. MONTGOMERY *v.* BLOWS

C. A. 899

12. —— *Industrial Disease—Certifying Surgeon—Contradiction—Appeal — Certificate final —Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 8, *sub-s.* 1 (*f*)—*Reg.* 8 *of Regulations of June* 21, 1907, *amended in* 1908 *and* 1910.

J. H. Bedford was a painter employed by Cowtan & Sons, Limited, and he claimed compensation from them for incapacity caused by lead poisoning contracted by him whilst in their service in 1914. He consulted Dr. Bond, a certifying surgeon under the Factory and Workshop Act, 1901, who on March 31, 1915, gave a certificate that the applicant was suffering from lead poisoning and its sequelae and was thereby disabled from earning full wages; that the disablement commenced on February 27, 1915; and that the leading symptoms of the disease were tremors in the arms and hands. There was no appeal to a medical referee. At the hearing of the arbitration Dr. Bond gave evidence confirming his certificate, and he was supported by another doctor. The employers called two doctors who had seen the claimant in June, 1915, and they gave evidence that he was not suffering from lead poisoning, but from "Parkinson's disease," which was not an "industrial disease" within the Act. It was suggested that it was open to them to prove that this was so since the date of the certificate, but they admitted in cross-examination that the applicant had been suffering from the same disease throughout, so that in effect their evidence was that the certificate was wrong and ought to be disregarded:—

Held (dissentiente Phillimore L.J.), that the only appeal from the certificate was to a medical referee as provided by s. 8, sub-s. 1 (*f*), and that in the absence of such an appeal the correctness of the certificate could not be disputed; the applicant was therefore entitled to compensation.

Held, per Phillimore L.J., that the certificate was only conclusive of the fact that the applicant had lead poisoning at its date, March 31 and backwards to February 27, but not forwards. BEDFORD *v.* COWTAN & SONS, LD. - **C. A. 980**

13. —— *Injury to Eye—Suspensory Award —Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (16.).

A workman was injured by accident in the course of his employment by a piece of metal entering his eye. Two days after the accident the fragment was removed by his club doctor. A fortnight later his employers sent him to an eye specialist, who stated that he could see no

WORKMEN'S COMPENSATION—*continued.*
trace of recent injury, but that there were old scars on both eyes, and that the recent injury might have healed up and left no trace. A week later the man was taken off his club by his doctor, who said that he had quite recovered and was as good a man as before the accident. The employers paid compensation in respect of two weeks' incapacity. There was no evidence of any probability of the recurrence of mischief to either eye resulting from the accident.

In an arbitration under the Workmen's Compensation Act the county court judge awarded arrears of compensation up to the date of the man's discharge from his club and made a suspensory order for the payment of a penny a week :—

Held, that it was not a proper case for a suspensory award.

Hargreave v. *Haughhead Coal Co.* [1912] A. C. 319 applied. LEVERINGTON *v.* A. DODMAN & Co. - - - - **C. A. 964**

14. —— *Proceedings before Arbitrator — Question of Law raised—Duty of Judge to take a Note—Medical Assessor—Function of—Consolidated Workmen's Compensation Rules, July*, 1913, *r.* 36.

In proceedings under the Workmen's Compensation Act, 1906, the duty of the judge under r. 36 of the Consolidated Workmen's Compensation Rules, where a question of law is raised, to make a note thereof and of the facts in evidence in relation thereto is imperative and independent of any request by the parties. He is not exempted from the performance of that duty by the fact that in any particular Court it is the practice for an official shorthand writer to attend and take a note of the proceedings, a transcript of which may be obtained by the parties on payment of the cost thereof. With the consent of the parties, however, the shorthand writer's note may be signed, certified, and adopted by the judge as his own note

A medical referee, summoned by the judge to sit with him as assessor, is not within his functions in cross-examining witnesses and acting as advocate for one side or the other. His duty is merely to assist the judge as an expert in deciding points upon which the judge cannot be assumed to have knowledge without such assistance. EARWICKER *v.* LONDON GRAVING DOCK CO. - - - - - - **C. A. 970**

15. —— *Workman receiving Compensation for Injury—Whether Relation of Master and Servant terminates—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58).

The fact that a workman receives compensation under the Workmen's Compensation Act, 1906, from his employer during temporary incapacity for work resulting from injury received by him during the course of his employment does not, of itself, terminate the employment, even though the contract of employment is merely at will.

Judgments in *Elliott* v. *Liggens* [1902] 2 K. B. 84 explained and followed. WARBURTON *v.* CO-OPERATIVE WHOLESALE SOCIETY **Div. Ct. 906**

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